S. HRG. 99-151

FTC AUTHORIZATION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

AUTHORIZATION OF THE FEDERAL TRADE COMMISSION

APRIL 24, 1985

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

50-111 O WASHINGTON : 1985

5261-43

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

JOHN C. DANFORTH, Missouri, *Chairman*

BOB PACKWOOD, Oregon	ERNEST F. HOLLINGS, South Carolina
BARRY GOLDWATER, Arizona	RUSSELL B. LONG, Louisiana
NANCY LANDON KASSEBAUM, Kansas	DANIEL K. INOUYE, Hawaii
LARRY PRESSLER, South Dakota	WENDELL H. FORD, Kentucky
SLADE GORTON, Washington	DONALD W. RIEGLE, JR., Michigan
TED STEVENS, Alaska	J. JAMES EXON, Nebraska
BOB KASTEN, Wisconsin	ALBERT GORE, JR., Tennessee
PAUL S. TRIBLE, JR., Virginia	JOHN D. ROCKEFELLER IV, West Virginia

W. ALLEN MOORE, *Chief Counsel and Staff Director*
RALPH B. EVERETT, *Minority Chief Counsel and Staff Director*

SUBCOMMITTEE ON THE CONSUMER

BOB KASTEN, Wisconsin, *Chairman*

JOHN C. DANFORTH, Missouri	WENDELL H. FORD, Kentucky

CONTENTS

Page

Opening statement by Senator Kasten 1
Opening statement by Senator Ford 3
Opening statement by Senator Hollings 4

LIST OF WITNESSES

Boyle, Joseph F., M.D., president, American Medical Association; J. Chrys Dougherty, member, house of delegates, American Bar Association; accompanied by Betty Jane Anderson, associate general counsel; John Bomba, president, American Dental Association; Eunice Cole, president, American Nurses Association; accompanied by Thomas Nichols, legislative director and counsel; Stephen C. Fogleman, counsel, National Association of Optometrtists and Opticians; and Jay Angoff, staff attorney, Public Citizen/Congress Watch ... 45
Prepared statements:
Mr. Dougherty 48
Mr. Fogleman 56
Mr. Angoff 60
Grassley, Hon. Charles E., U.S. Senator from Iowa 6
Joseph, Jeffrey, vice president for domestic policy, Chamber of Commerce of the United States 28
Prepared statements:
Mr. Joseph 31
Mr. Connor 32
Levin, Hon. Carl, U.S. Senator from Michigan 4
Miller, Hon. James C., Chairman, Federal Trade Commission 16
Prepared statement 24
Questions of Senator Hollings and the answers 25

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

American Advertising Federation, statement 88
American Association of Advertising Agencies, statement 70
American Dental Hygientists' Association, statement 92
American Optometric Association, statement 76
Braden, Susan G., chairman, antitrust law and Federal trade regulation section, Federal Bar Association, statement 74
Callahan, E. F., chairman, National Credit Union Administration, letter 103
Committee on Antitrtust and Trade Regulation on behalf of the Association of the Bar of the City of New York, statement 94
Goldbeck, Willis B., president, Washington Business Group on Health, statement 82
Hatfield, Hon. Mark O., U.S. Senator from Oregon, statement 67
Leichtnam, Karen, legislative assistant, HALT, Americans for Legal Reform, statement 76
Miller, Hon. James C. III., Chairman, FTC, letter 104
Miller, Thomas J., attorney general, State of Iowa, statement 67
National Association of Federal Credit Unions, statement 78
National Association of Manufacturers, statement 84
Opticians Association of America, statement 81
Reynoldson, W. Ward, president, Conference of Chief Justices, letter 102
Zaucha, Thomas K. president, National Grocers Association, letter 96

FEDERAL TRADE COMMISSION AUTHORIZATION

WEDNESDAY, APRIL 24, 1985

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SR-253, Russell Senate Office Building, Hon. Robert W. Kasten (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: David Zorensky, Chuck Harwood, staff counsels; and Amy Bondurant, minority staff counsel.

OPEN STATEMENT BY SENATOR KASTEN

Senator KASTEN. The committee will come to order.

Today the Consumer Subcommittee is holding a hearing on the authorization of the Federal Trade Commission. The agency has had an important mission, to protect consumers from unfair methods of competition and unfair or deceptive acts or practices.

Unfortunately, the last Federal Trade Commission authorization enacted into law was the Federal Trade Commission Improvements Act of 1980 which expired at the end of fiscal year 1982.

Since then, the FTC has been without a formal authorization, although the Commerce Committee has held numerous hearings and reported two authorization bills to the full Senate.

The last FTC authorization bill reported by this committee was S. 1714. This bill was adopted unanimously by the committee in the 98th Congress; however, floor action on this important measure was blocked because of impasses on two issues: the question of the legislative veto and the definition of the FTC authority over the professions.

S. 1714 contained no legislative veto provision, but it did contain compromise language limiting the authority of the FTC to preempt State law in order to regulate the activities of professionals. S. 1714 also contained important compromises in two other areas: the FTC authority over Ag co-ops and its regulation of unfair advertising.

In addition, the bill contained a number of other important reforms in FTC authority and procedures. These reforms included a statutory definition of unfair acts or practices, the requirememt of a showing that challenged conduct is prevalent in an industry as a prerequisite for FTC rulemaking, the repeal of the Commission's authority to compensate public participants in rulemaking, and codification of the so-called *Braswell* standard of review for knowing violation of FTC orders.

After today's hearing, I intend to introduce an FTC authorization bill that provides new funding authority for the agency for the next 3 years, and that also embodies the substantive provisions and reforms that were adopted by this committee in S. 1714.

In addition, the bill will contain an authorization for a special appropriation of $3,811,000 for a one-time building consolidation of the headquarters offices of the FTC in Washington. This consolidation is supported by the GSA and OMB. It's also been recommended by the Grace Commission as a means to obtain long-term savings in the operation of the agency.

We are here today to engage in an overall review of FTC activities, but our primary concern is the need for an authorization, and the focus of the hearing will be those issues that blocked action on S. 1714: the legislative veto and the professions issue.

It is my hope that after a review of these issues, we can move forward to swift enactment of authorizing legislation along the lines of S. 1714.

With respect to the legislative veto issue, I would like to note that I share the view that a new legislative mechanism for review of agency rulemaking can and should be established to fill the void created by the Supreme Court's *Chadha* decision.

I am preparing a proposal that would establish simple, expedited procedures for a joint resolution of disapproval of agency rules without impairing the appropriations process. I intend to offer this proposal as a floor amendment to the FTC authorization.

Right now, it is my hope and understanding that because this issue will be addressed on the floor, it is an issue that we ought not to address in the committee, except from the point of view of taking testimony and reviewing the various proposals.

As for the professions issue, S. 1714 contained compromise language on the scope of the FTC's authority to invalidate State law to regulate the activities of professions. This compromise language was intended to protect the traditional and important role of the States in establishing criteria which guarantee the quality of professional services while ensuring that Federal laws against anticompetitive acts, fraud, and deception are fully enforced.

This balance of interests was supported by the administration and by a number of professional groups. Objections to this compromise language were an obstacle to floor action on S. 1714. It now appears, however, that the need for this provision or any other so-called professions language is being questioned in light of recent Supreme Court decisions clarifying the scope of the State action doctrine and in light of the sensitivity of the FTC to professional self-regulation and to State concerns in this area.

Thus, I look forward with great interest to today's testimony on this section of S. 1714. There is a, perhaps, a basis for general agreement here on an approach to the professions question that will lead to an enactment of an FTC authorization.

We need an FTC authorization now. Such legislation is essential to reaffirm congressional support for the Agency and to restore order to the legislative process. It is my intention to hold broader oversight hearings on the activities of the FTC after we have acted on an authorization, but the authorization is my primary concern

now, and it is my hope that after today's hearing we can move on a bipartisan basis to secure swift enactment of such a measure.

Our first witnesses are Senator Levin and Senator Grassley. I see that Senator Grassley is not here so, Carl, we welcome you to this hearing and look forward to your testimony.

Senator LEVIN. Thank you, Mr. Chairman and members of the committee.

Senator FORD. Excuse me, Senator.

Would it be too much to ask the chairman if others might make an opening statement?

Senator KASTEN. You are right. I am sorry.

Senator Ford.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Today, we once again revisit important issues that must be resolved in order to reauthorize the FTC.

With the Supreme Court's decisions declaring the legislative veto unconstitutional, the committee has revisited the issue of its role in insuring responsible regulatory agencies. Finding a remedy for the frustrations of a large and oftentimes ineffective Federal Government is an important challenge.

I have been an outspoken opponent of the legislative veto, as I believed this procedure was not only unconstitutional, but also ineffective. As Senate floor manager of the FTC authorization in 1980, I stated during that debate on the legislative veto issue: "The only way Congress can be assured that this agency—or, for that matter, any agency—is following through, is through regular and vigorous oversight. If it is determined that congressional intent is not being met, then steps must be taken to put the agency back on the proper course."

I continue to believe there is no substitute for vigorous oversight. I also believe there is no substitute for carefully considered statutes such as the statutory definition of unfairness. We have worked on this definition for the last 7 years and it will be part of the next authorization bill to become law.

I do contrast this slower approach to approaches that simply provide an up or down vote on a rule. Congress can say no to what the agency does, but cannot take upon itself to say what the agency should do. However, I will certainly listen to colleagues, Senators Grassley and Levin, with interest.

I look forward to all the testimony this morning and hope that a consensus can be reached to reauthorize the FTC.

I have been opposed to legislative veto, and I think vigorous oversight is the only answer. I continue to oppose legislative veto and have some problems with the version to be presented by our distinguished witness.

So we will get down to it. I think, in deference to the chairman, that it ought to be settled in committee, and then take it to the floor.

I think to delay the issue's consideration until the Senate floor is just a delay, and I would like to see the issue revisited in this committee.

Senator Hollings has asked me to insert his opening statement in the record.

[The statement follows:]

OPENING STATEMENT BY SENATOR HOLLINGS

The last formal authorization of the FTC to become law was the FTC Improvements Act of 1980. The former Chairman of the Consumer Subcommittee, Senator Ford, had chaired many weeks of hearings on the controversial issues of the time which resulted in that 1980 law.

The 1980 law expired in 1982 and the FTC has been operating without an authorization. The FTC should be reauthorized expeditiously as the agency has an important mission to protect both consumers and business from unfair, deceptive, or anticompetitive practices. But I remain concerned that the agency is no longer fulfilling its core mission as the cop on the beat protecting against deceptive practices.

Historically, the FTC's mere existence has had a deterrent effect on practices illegal under the antitrust laws, such as predatory pricing. I am concerned that this is no longer true. I am concerned that the FTC has a deaf ear to other laws such as the McCarran-Ferguson Act which exempts the business of insurance from the antitrust laws. I am also concerned that the agency has used poor judgement in setting its enforcement priorities with antitrust actions against our nation's cities.

We will be revisiting issues in these reauthorization hearings, such as the Federal regulation of the professions. This is an important issue and I am certainly interested in the views of all of our witnesses.

I look forward to the testimony on these and other topics and hope to work closely with subcommittee Chairman Kasten and Senator Ford.

Senator KASTEN. Senator Gorton, do you have any opening statement?

Senator GORTON. No, Mr. Chairman.

Senator KASTEN. Senator Carl Levin from Michigan.

STATEMENT OF HON. CARL LEVIN, U.S. SENATOR FROM MICHIGAN

Senator LEVIN. Mr. Chairman, first let me thank you and the members of the committee for allowing Senator Grassley and me to testify this morning. This week we will be introducing, along with our colleagues, Senator Boren and Senator DeConcini, the Agency Accountability Act of 1985 which we believe is the most responsible answer to the Supreme Court's decision in *Chadha*, in which one and two House legislative vetoes were sweepingly overturned.

Although the Supreme Court struck down, through the breadth of its opinion, the existing legislative vetoes over agency rulemaking as well as legislative veto mechanisms in other areas, such as foreign policy, budget, and reorganization, the need for a shared power mechanism is not diminished.

Our attention has been focused on and this bill addresses the area of agency rulemaking, and we would hope that this committee would, either during the committee deliberations or on the floor, support the approach which we are now going to outline.

The reason why a legislative veto is necessary is that the executive branch and independent agencies continue to churn out thousands of regulations which directly and significantly affect our lives without the politically accountable involvement of the Congress.

Mr. Chairman, the reason and the need for the legislative veto over agency rulemaking have not changed; but because of the Supreme Court's decision, the mechanics of its procedure must be different. The bill that we are going to be introducing this week and

the amendment which we would be offering on the FTC bill meet the constitutional tests laid out by the Supreme Court in *Chadha* and at the same time gives Congress the power over these regulations which it should have to assure agency accountability to the public without creating an unmanageable workload.

The Levin-Grassley bill and the amendment which Senator Grassley will offer on FTC on our behalf are similar in some respects to earlier versions. But the critical difference is this: They provide for a prohibition on the appropriation of funds for the implementation of any rule for which a joint resolution of disapproval has been passed by both Houses of the Congress.

We use the constitutional mechanism of a joint resolution of disapproval which was contained in the earlier versions of the Levin-Boren legislative veto which passed the Senate 87-10 in 1980, and that means that both Houses of Congress and the President are required to pass and sign respectively the disapproval resolution.

This meets the essential elements of the *Chadha* decision which requires involvement by both Houses of Congress and presentment to the President. The bill categorizes rules into two areas: major and nonmajor. These are the terms which the agencies and Congress have been familiar with over the last several years.

The definition of a major rule is contained in the bill and a similar definition was contained in S. 1080 which passed the Senate by a vote of 96 to zero in the 97th Congress.

The reason for distinguishing between major and nonmajor rules is to avoid any unnecessary delay in the implementation of noncontroversial rules. Major rules require more time for analysis because of their likely complexity, but it would be unfortuante to submit other rules which are simpler and less important to the same timeframe. Thus, the bill establishes a 90-day delay period from the time the rule is sent to the Federal Register for publication as final and a 45-day delay period for non-major rules. "Days" are defined as legislative days. A rule may take effect during either the 90- or 45-day time periods if either House of Congress defeats a joint resolution of disapproval. Expedited procedures are included for the prompt consideration of a resolution of disaapproval.

Mr. Chairman, this bill adds a new and important provision establishing an internal mechanism for controlling the appropriation of funds for the implementation or administration of a controversial rule. If both Houses of Congress have passed a joint resolution of disapproval, but the President has vetoed the resolution and Congress has not overturned the veto, the appropriation of funds for that rule would then be restricted.

In that situation and only in that situation, a point of order will lie against final passage of any appropriations bill for the agency with responsibility for administering the rule, unless the appropriations bill has a specific restriction in it which prohibits the use of any of the appropriated funds for the administration or enforcement of the subject rule.

This provision is constitutional because it is a housekeeping measure, internal to the Congress. It is not a legislative act requiring presentment to the President. It is merely a statement of Congress's internal rule of procedures with regard to regulations which have been disapproved of by both houses.

Mr. Chairman, Senator Grassley and our other cosponsors have given a great deal of thought to the subject of an appropriate response to the *Chadha* decision. In the interests of achieving a Governmentwide legislative veto mechanism over agency rulemaking, we have experienced a lot of give and take and we are proud of the final product that we will be introducing because it is effective, it is constitutional, and it is reasonable. It requires both Houses of Congress to act. It requires presentment to the President. It meets the test of *Chadha*.

But again, if both Houses act and the President vetoes it, and we are unable to overturn the veto, it then provides that the appropriation process will take over and a point of order will lie against any appropriation which does not contain the prohibition on the expenditure of funds for the rule which both houses of Congress have decided to overturn.

We hope, of course, that this committee will join in support of this measure.

Senator KASTEN. Senator Grassley has joined us, and I would like to ask the Senator to come up to the table now and we will receive his testimony. And then I think we can ask the two of you questions at the same time as a joint venture.

The Senator from Iowa, Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, U.S. SENATOR FROM IOWA

Senator GRASSLEY. I will read my statement and not repeat anything that Senator Levin referred to. And then I will be glad to answer any questions.

Mr. Chairman, I want to thank you for inviting me to testify before your subcommittee today on what I consider the forgotten element of the economic recovery program you and I helped set forward as newly elected Senators in 1981.

All Americans are aware of our work in reducing taxes, and even today on the Senate floor we will be continuing our battle to reduce Federal spending. But after an initial flurry of activity, we seem to have allowed the momentum to slip away on the other priority we set in 1981: regulatory reform.

The dangers to our system of an unfettered Federal regulatory apparatus have long been recognized to be equal to those of growing Federal spending and taxation. Senator Robert Taft, recognized by this body as one of the five greatest Senators of all time, warned of these dangers in a 1943 speech about the spreading reach of the Federal Government.

Senator Taft said:

> In order to prevent tyranny, the founders divided even the limited powers given the Federal Government between the President, Congress, and the courts, in order that no one might have the domination over the individual which would submerge his life in that of the Government. Today that division is threatened. Administrative boards are established which make their own laws, administer the laws which they make, and then hear the cases which they themselves bring for the violation of their own laws.
>
> As a result, we have seen * * * a complete elimination of any sense of justice and fairness. Men are coming to shrug their shoulders with helpless indifference, who should be burning with indignation. If continued, it will undoubtedly destroy that cornerstone of American character: a deeply ingrained resentment against injustice.

If Senator Taft had lived until the decade of the 1970's, he would have seen his warning about the tyranny of administrative agencies come to pass through the activities of the Federal Trade Commission. And as we consider a new authorization for the FTC and mull the future of regulatory reform efforts, it is important to look back at the late 1970's and remember.

The FTC was so activist back in those years that the Cincinnati Enquirer editorialized that "If the FTC * * * had had its way, not a sparrow would have fallen to Earth anywhere in America without the FTC's sanction."

In 1980, our former colleague, Jack Schmitt, pointed out that the FTC was simultaneously considering rulemaking in more than 20 areas. These proposed regulations literally ranged from the cradle—children's television advertising—to the grave—funeral homes. And Senator Schmitt, if anything, understated the case; he left out the FTC's interference into insurance, agricultural cooperatives, and trademarks.

It seemed the FTC thought its mission was, to paraphrase Star Trek's Captain Kirk, to boldly regulate where no Federal agency has ever regulated before.

But even worse than the FTC's half-cocked, scattershot activism was the agency's employment of methods that would offend anyone's sense of justice. In instances like the children's advertising investigation, the agency stretched its mandate by investigating practices that weren't really unfair—but merely unpopular with its staff of social engineers.

The agency in many cases conducted fishing expeditions in which they harassed legitimate businesses with subpoenas for volumes of information without discussion or an explanation of the purpose. They often acted in secret, off the record, and without a full investigation of the effects of the proposed regulation on the industry involved.

And worst of all, the staff was described as arrogant and indifferent. And the reason for that arrogance is that the staff of the FTC in the 1970's, and to some extent the Commission members, had no regard for the market, for our system of federalism, for the people of our nation, or for the sense of justice Senator Taft so rightly ascribed to American society.

Their only regard was for their own sense of justice and order, and for the imposition of that order on society.

So our experience with the FTC proved Senator Taft right in a sense. But it also proved him wrong. Because our resentment of justice was assailed by the FTC—but it was never destroyed. Thankfully, some truly tenacious Members of Congress—including our former colleagues Jack Schmitt and Elliott Levitas, and Congressman Jim Broyhill—saw what was happening.

They stood up to the FTC and its entrenched supporters, fighting to control that agency to the extent that at one point the FTC actually closed down for lack of money. And finally, Mr. Chairman, they pulled in the reins on this runaway agency in 1980.

They limited substantive activity in several areas of proposed regulation. But even more important, they established for the first time a congressional veto over FTC rulemaking.

This authority has been exercised to review regulations involving games of chance, and the funeral industry. And it has been used to veto proposed FTC regulations involving the used car industry.

The activities of the legislators I mentioned and many others paved the way for later regulatory reform efforts. The FTC legislative veto provided the model for the Schmitt-Grassley-Levin-Boren legislative veto provision that was passed by the Senate as part of a comprehensive regulatory reform bill in 1982, and many of the other provisions of that comprehensive legislation found their genesis in the 1980 FTC amendments.

But our efforts to expand Congress' reaffirmation of its prerogatives to other agencies suffered a setback in 1983, when the Supreme Court—in a supreme overreaction—declared all legislative veto provisions unconstitutional in the *Chadha* decision.

However, Senator Levin and I have devised a congressional veto provision which meets the requirements of *Chadha*—passage of both Houses of Congress plus approval of the President—with a twist.

Our legislation creates a two-step process for halting agency action. First, major agency rules, as defined under the bill, will be considered recommendations only until 90 days after they have been reported to Congress. The waiting period for nonmajor rules is 45 days. During that waiting period, the appropriate committee way commence a joint resolution of disapproval, and the rule establishes procedures for expedited floor consideration of such a resolution.

After 60 days for major rules, and 30 days for a monmajor rule, the committee may be discharged from consideration of the legislation by a vote of one-fifth of the Members of that House of Congress. If Congress has not acted by the end of the waiting period, the rule may take effect.

The second step is the twist. The passage of the joint resolution by both Houses of Congress gives rise to a point of order for any appropriations bill involving the relevant agency which does not bar use of government funds to implement the rule. For rules previously subject by law to a one-house veto, the passage of a joint resolution by either House of Congress would give rise to this point of order. Therefore, even if the President does not sign the joint resolution of disapproval mandated by *Chadha*, the agency in question will still be prevented from going forward with the rule by lack of funds.

It is our intention to introduce on the floor an amendment to the FTC authorization that would establish the same sort of veto authority over FTC rulemaking. Of course, the exact language of that amendment will depend on the wording of the final version of the authorization as reported by the full Commerce Committee; right now we only have a draft to work from.

Nevertheless, we have produced a draft amendment which I will submit for the committee's perusal today. Our generic legislative veto bill will be introduced in the next few days. But I do want to thank the Chairman again for allowing us to come forward at this time to establish a record on the proposed amendment.

Allow me also to rush to point out that many of the specific problems I referred to earlier have been corrected under the able lead-

ership of the present Commission chairman, Jim Miller. Under his leadership, the FTC has regained the perspective and sense of justice sorely lacking prior to the Reagan administration.

But we should not allow personalities to cloud our objectivity on this issue. The fact is that Jim Miller will not always be Chairman of the FTC, and for that matter, Ronald Reagan will not always be President. The potential for abuse will remain beyond their tenure, and it is important that we maintain the precedent of congressional review in anticipation of the day in which it will be needed.

And even during their tenure, the possibility exists that rules will be proposed that extend beyond the intent of Congress. An example of that is the used car rule I mentioned earlier; and I continue to receive letters warning of continued FTC pressure to regulate self-regulating professions such as the legal and medical professions.

But even beyond those practicalities lies the real issue. As Senator Taft pointed out, it was to avoid the kind of tyranny we saw in the late 1970's that the Founding Fathers divided power among the three branches. The American people simply have the right to control the activities of the Federal Government through their elected representatives.

The legislative veto is the only method I can conceive of that would allow both this measure of control and the delegation of powers Congress has made to agencies such as the FTC. And to anticipate another question, the point of order on appropriations is the best method conceived of so far to give Congress a meaningful veto over executive actions within the confines of the *Chadha* decision.

It is important that the point of order over appropriations be included, rather than simply permitting amendments to appropriations bills limiting the use of funds, for two reasons. No. 1 is to shift the burden in favor of the opponents of a rule, once they have convinced Congress to act against that rule through a resolution of disapproval. This will make it harder for proponents to take advantage of the natural momentum that the rulemaking procedure gives proposed regulations, which tend after the expenditure of time and effort to take on a life of their own.

The second reason is the nature of the appropriations process today. I can't think of a single year recently when Congress has not been under a tremendous amount of pressure to pass its appropriations bills. Absent a point of order, it would be too easy to sweep aside objections to a regulation in the rush for Congress to complete its constitutionally mandated business.

Mr. Chairman, because of the sensitivities of our Founding Fathers, resulting from the injustices perpetrated upon them without due process or representation, our system has always been set up to require the Federal Government to meet a large burden before depriving Americans of life, liberty or property.

If we are to maintain what Senator Taft described as "the conerstone of American character, a deeply ingrained resentment against injustice," we must insure that Federal agencies continue to bear the burden of demonstrating the need for new regulation—and that Congress continues to bear the burden to protect the public from unjust action.

Reinstating the congressional veto over FTC regulations will be an important symbolic step in that process. Again, Mr. Chairman, thank you for your consideration.

Senator KASTEN. Senator Ford.

Senator FORD. I have your time?

Senator KASTEN. We are not using the lights today.

Senator FORD. I am delighted to see both of you here today in a joint concern over the problems we face.

I want to make some points and let's just talk about section 7 if we can. And that is a point of order on appropriations.

If I read it correctly, Carl, it says:

> If the Senate and House have passed a joint resolution of disapproval, pursuant to this act, then a point of order will lie against any appropriations bill, amendment, or resolution, providing money for the relevant Agency unlesss such bill, amendment, or resolution contains an express prohibition on the use of any of the appropriated funds or the implementation of the subject rule.

Now, the next sentence is one that bothers me considerably. "This point of order will lie regardless of whether or not the joint resolution of disapproval has been enacted into law."

You are requiring the signature of the President, period, aren't you?

Senator LEVIN. For the joint resolution to be enacted into law, it would require the signature of the President.

Senator FORD. So the President has to sign it. He could veto it, and then we would have how long to override the veto?

Senator LEVIN. Whatever the normal length of time is.

Senator FORD. In any event, the time of uncertainty could extend into weeks or months.

The point I am making is, aren't you creating havoc for the Appropriations Committee?

Senator LEVIN. We don't think so. We think that in the very unusual instance that this would occur—remember, these occur perhaps at the rate of one a year, typically, from the period 1973 to 1983; that the Appropriations Committee, if it had the appropriations bill for the particular agency in front of it, and if a veto had taken place for that joint resolution, would simply—if the veto were not overturned—put in a prohibition.

It is a very simple mechanism, Senator Ford. What we are saying——

Senator FORD. Simplicity here is creating a great deal of problems.

Senator LEVIN. Well, the intention at least is very straightforward. What it tells the Appropriations Committee is this. If, in that rare instance, maybe on the average of one time a year, that the Congress adopts a joint resolution of disapproval of a rule which is vetoed by the President and not overruled, where the veto is not overturned by the Congress, then put in a prohibition in the appropriations bill.

Just put the prohibition on the power of the agency to spend funds to enforce a rule where both Houses of the Congress have said we want to veto that rule.

Senator FORD. Well, let me just ask you this question. Can we now now put an amendment on any piece of appropriations legislation saying that "no moneys in here shall be used for."

So do you really need the language?

Senator LEVIN. Oh, we could do that, but then there is no self-enforcing mechanism for legislative vetoes. What we are seeking here is to preserve some kind of a balance between the executive and the legislative branch, which is the heart of legislative veto. It is a way of having a self-enforcing mechanism, putting some teeth into legislative veto which were taken out by *Chadha*, but to do it in a constitutional way.

Of course, the Congress has the power to prohibit the spending of funds for an agency, but that is not a self-enforcing mechanism, nor does it carry the weight of a point of order.

Senator FORD. Why? If the agency cannot spend the money, that is not self-enforcing.

Senator LEVIN. What I am saying is that this has a self-enforcing internal mechanism, that it will come to the floor right in the bill, and we know it will, or else there will be a point of order.

That is a self-enforcing mechanism.

Senator FORD. Well, let's just look at one time a year, once a year.

Senator LEVIN. Average perhaps.

Senator FORD. Perhaps. But perhaps not. I have always found the balance to be provided by the people. And I point to our chairman as an example of why we do not need a legislative veto. When we had the 10-percent withholding on dividends and interest, he carried the spear.

And that problem was remedied by the legislative process. If the people are up in arms, we are going to get the message, and we can make the correction.

Now, just because somebody has some particular problem about a regulation does not necessarily mean that the public disapproves. If the public disapproves, we find a great deal of legislative clamor to remove it.

On that basis, I wouldn't think you need a legislative veto. And let me give you another, more recent, example. We made a huge mistake by approving the IRS rule that made businessmen fill out burdensome forms for commercial vehicles. We got rid of that pretty quick, didn't we? We could hardly wait to get that piece of legislation out and passed so we could stop all that foolishness that we had done ourselves. An agency hadn't done that. We did that ourselves. But we got rid of it.

I think under the circumstances, that we are treading into some other burdensome and possible constitutional problems. I think a possible constitutional problem is raised since the President would have to ultimately veto the whole appropriations bill because he cannot line-item veto, and you have got a prohibition against appropriations. Therefore, you can't appropriate.

Now, I don't know whether you can remedy that by language or you can solve some of the problems of vesting a burdensome process but, Carl and Chuck, I think you have got to give this some very, very serious consideration as it relates to what you are imposing upon the President, then on the Appropriations Committees of both the House and the Senate. And you say it is a little, simple mechanism, but I think it is more complicated than that.

Senator GRASSLEY. The presumption of the Senator from Kentucky is that the balance of Government is in favor of the people in the form of Hill representation.

Senator FORD. Gosh, I sure hope so. If it's not, we are in real trouble.

Senator GRASSLEY. Well, it is a fact of life that our whole governmental process is geared against change, against the reflection through the political process of the will of the majority. We have institutionalized the status quo. The process of Government goes on. The process of Government and part of that process is rulemaking just goes on unless there is contrary action taken.

Now, the question is whether or not you think that that process ought to be slowed, and whenever there ought to be some political will involved with it. It is very difficult in the rulemaking process to inject that political will. This is one constitutional way of doing it. There are better ways that existed prior to the *Chadha* decision but those are now unconstitutional. This may not be the only way, but to think that any time we want to get something changed, that somehow the will of the people is reflected in the Congress of the United States is naive and just not the way the facts lay out. Our process of Government is to allow that process to go on unless there is an intervention. And the intervention is very difficult.

It is even more difficult now, as a result of the *Chadha* case, and so we move as best we can within the Constitution to allow that will, to allow people to be part of that process, but the balance is not in favor of the people.

Senator FORD. Senator, did you have any trouble supporting or not supporting the 10-percent withholding on dividends and interest?

I just ask, did you have any trouble?

Senator GRASSLEY. I voted for it, and I changed my mind.

Senator FORD. Oh, OK.

Senator GRASSLEY. And so you are using that as an example, and let me tell you——

Senator FORD. I asked you if you had any trouble supporting it.

Senator GRASSLEY. In the first instance, I did not have any trouble supporting it, and I didn't have any trouble in the second instance voting to repeal it.

Senator FORD. It didn't take you long either, did it, to make up your mind?

Senator GRASSLEY. Probably too long.

Senator FORD. OK. Now, second——

Senator LEVIN. I would like to comment on that. It took about 2 million letters that came in that were inspired by banks and savings and loans to change Congress around. That is hard to pull off on agency rules.

It wasn't even an agency rule there, by the way. My recollection is that we were not dealing with a regulation there, nor were we dealing with a regulation with this IRS. In both cases——

Senator FORD. It is an IRS regulation that we put in the bill.

Senator LEVIN. I think the Congress had put that into the reconciliation.

Senator FORD. Oh, I said that earlier, that that was in.

Senator LEVIN. Yes, but here we are talking about congressional review of agency regulations, so neither the IRS action which we had required by law nor the withholding which we had required law, are examples of what we are talking about.

What we are talking about are the hundreds of agency rules that should be reviewed by somebody. Then the question is well, how do you inspire some kind of accountability? Do you want to make it easy for the Congress to veto a regulation which affects a whole lot of lives, like the used car rule affected a whole lot of lives? And we put something in the FTC bill and, as a result of the FTC legislative veto, we overturned the used car rule regulation. It is a perfect example, but one of the few.

So I don't think either of your examples really are applicable to the question of legislative veto of agency regulations. They both relate to congressional actions which we corrected.

Senator FORD. When was the last time you attended an oversight hearing?

Senator LEVIN. Just about every week, I think.

Senator FORD. Of what?

Senator LEVIN. Well, I am on the Governmental Affairs Subcommittee.

Senator FORD. So that's basically—Senator Grassley, when is the last time you attended an oversight hearing?

Senator LEVIN. In fact, when we leave here, I will be going to the Office of Government Ethics oversight hearing.

Senator GRASSLEY. Senator the whole process of Congress is involved in either of two functions. One is an oversight function or a legislative function, and they are so intertwined that every committee meeting I attend, whether it is a hearing or whether it is part of the process, is part of that.

But your question implies that that is enough. And that is not enough because we must be able to take corrective action. And the whole legislative process is geared to no change or making change very difficult. Every place you are blocked, at the subcommittee or the full committee or even a Presidential veto.

You know, to change the status quo in America is very difficult. It ought to be very difficult, but it should not be almost impossible.

Senator FORD. Well, you keep telling me about the Constitution and how great it is, and now you are trying to find a way to get around it. And we can change anything any day we want to by law. All we are trying to do is to get around our responsibility. We get around our responsibility by beating our chest, saying that we want to change this because we want to stop the regulation of agencies we have supervision over.

The point is, we are not supervising. And I will send each of you what we did in 1979 and what we did in 1980 as related to the FTC. We had many oversight hearings and we changed it. And not many committees can say that.

So what you are doing in my opinion is abdicating your responsibility as U.S. Senator from Iowa if you think this is the way out. You can fuss about the system all you want to, but only you and I as individuals representing our people can change the system, and we have the ability under the Constitution and the law today to change it.

Senator LEVIN. I would like to agree in part with what you said, Senator Ford. I think we have abdicated our oversight responsibility to a significant extent as a Congress over the years, and frankly I came to this town determined to participate very actively in the oversight of agencies, because I had seen agencies run rampant in my hometown, without any accountability

I came to my elected representative and said I need some action relative to HUD. It was destroying my town. And the answer I got was, gee, we can't do anything about it; go to HUD. It's their regulations; go to HUD.

And I said but we want you to review their regulation and to veto their regulations. The answer was, well, my gosh, that could be subject to a filibuster, that could be subject to all of the exigencies of the legislative process. Which is fine, and that is all right.

All we are trying to do here is make it a little easier for Congress to carry out its responsibility if it wants to. Remember, it still takes a majority vote of Congress to act. We are just trying to have expedited procedures to bring it up, and then let the majority rule in the Congress if it doesn't want something to be carried out in its name.

These laws are supposed to be executed in our name. If they are not being executed according to the will of Congress, then a majority of the Congress ought to have a right to say no. That is the whole issue here. Is it going to be a majority of the Congress, or is it going to require two-thirds of the Congress? That is the whole issue here.

But I couldn't agree with you more. I think too often we have abdicated our oversight responsibility. This is not a substitute for oversight at all. This is very complementary to oversight. And, as a matter of fact, the veto of rules would very often come from the implementation of oversight hearings. It would be the result of oversight hearings. So they work hand in glove: Oversight and the veto of regulations which violate the original congressional intent or otherwise don't carry out the spirit of congressional enactment.

Senator KASTEN. I would like to just say that I am hopeful that we can wrap up this discussion. I am not sure that we are going to come to any consensus this morning.

Senator FORD. Just one other point I want to make. I want to get some information here to be sure I am right.

I was accommodated, if I could use that word, by this committee several years ago when I put into law the requirement for this committee to hold two oversight hearings on the FTC every year, once every 6 months.

So I lost the chairmanship. I don't remember how many oversight hearings we have had in the last few years, but the law expired, and we haven't even been reauthorized for a long, long time, since 1982.

So I understand that it is nice to be out here beating the drums to get rid of regulations. But we already have a way to get rid of them, and I still think there is a possible constitutional shadow over what you are requiring the President to do as it relates to appropriations bills. I further think you ought to revisit the requirements you have on the Appropriations Committee because you are going to create some havoc for them.

Senator LEVIN. The legal counsel has approved this constitutionally, by the way, so I think the constitutional question——

Senator FORD. That is just like the Attorney General giving an opinion. It is the law until you take it to court, and you can bet your sweet bippy, this one will go.

Senator LEVIN. Well, I would like to—I don't know what my bippy is worth in currency, but I would like——

Senator FORD. Whatever you can sell it for. Down home they say if you have got a willing buyer and a willing seller, the price is whatever you can get.

Senator LEVIN. I hope something close to what you are going to get tonight for that wonderful thing that we are auctioning off. But putting that——

Senator FORD. Got an original bid of $6,000.

Senator LEVIN. Great.

Senator FORD. So we are moving on.

Senator LEVIN. That is a lot more than my bippy is worth.

Senator FORD. That is right.

Senator LEVIN. But let me just say this, and I will try to conclude because I know the Chair is trying to move on. The one thing I am very confident of is that it is constitutional. It meets *Chadha*. It meets the presentment requirement and the two house requirement.

The appropriation issue internally I think is something we are going to debate, obviously. But in terms of the constitutional requirements, I am totally satisfied. And I am a lawyer, and I have challenged cases, and you never know; it could end up in court. I am not saying someone can't take you to court. But I am very, very confident, having been inside of *Chadha*, listening to it debated, read everything I could about it, that this meets the requirements of *Chadha*.

Senator KASTEN. Senator Gorton, do you have any questions?

Senator GORTON. No, Mr. Chairman.

Senator KASTEN. I just want to say, No. 1, we thank you for your testimony. As you know, I share your concern about the need for a legislative veto mechanism to review and to control regulation by Federal agencies. I don't, however, believe that the interference with the appropriations process is needed, and hopefully this debate will go on. I know it will go on.

We very much appreciate your testimony this morning. We thank you very much.

The next witness is Mr. Jim Miller.

[Pause.]

Senator KASTEN. Our next witness is Mr. James Miller who is the Chairman of the Federal Trade Commission. We appreciate very much the opportunity, Jim, of working with you. As you know, your entire testimony will be made part of the record. We would hope that you would summarize your testimony and then go on to questions.

Mr. Jim Miller.

STATEMENT OF HON. JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. MILLER. Thank you, Mr. Chairman.

I am delighted to be here to testify on behalf of the Federal Trade Commission. We believe strongly that reauthorization is the No. 1 priority we face today at the Commission. I think businesses need to know that the FTC statute has been reviewed and reaffirmed by elected officials, especially since the Agency has had a time of troubles in the late 1970's. Consumers need to be reassured that the FTC will continue its protections, given its hiatus and some of the misleading stories, concerning some of the activities or intentions of those in the administration and those on Capital Hill about the Agency.

I think the FTC needs certain facilitations. I think it would be very wise to codify the Braswell standard, to spell out what the Commission's professions authority is, to grant a CID authority for antitrust, and to end the automatic stay of cease and desist orders.

But I think the FTC also needs to be given certain guidelines and constraints on its activities. I think a legislative definition of unfairness is appropriate. The Commission needs a legislative limitation on the scope of the Commission's authority with respect to professions. I think we should be required to find that a business practice is prevalent before engaging in a rulemaking. I think the continuation of the prohibition of the Commission's activity under the Lanham Act with respect to trade marks is appropriate. And, finally, I am in favor and the majority of the Commission is in favor of some kind of constitutional version of legislative veto; to wit, simply a joint resolution that Commission rules would essentially be in abeyance for a certain number of days, legislative days, to give the Congress the time to review the rule. There would be a mechanism that would put a joint resolution on the floor of the House and the Senate for an up or down vote and then go to the President for his signature. This would be constitutional because it would make it an ordinary law.

I think without reauthorization the FTC, through the appropriations process, is an easy mark for special interests, whether it be for professions or municipalities, or whatever. I am concerned that since the Commission has gone now since October 1982 without a reauthorization, it is especially important that the Commission receive its reauthorization as soon as possible.

I welcome the chance to testify before you today. This Committee reported out last year, I think, a very reasonable, responsible piece of legislation. And in the main, the Commission supports the various divisions of that piece of legislation. We hope that that piece of legislation will serve as the vehicle for reauthorization for the Agency, and that it could be moved expeditiously. And I am very encouraged to know that work on drafting the legislation along those lines is underway, Mr. Chairman.

I would be glad to respond to any questions now that you or other members of the committee might have.

Senator KASTEN. Thanks.

I would like for you to describe for us the types of professional conduct that are regulated presently by the FTC, and I would also

like for you to tell us if the Agency is exercising its authority now in a manner that is consistent with the so-called compromise, the professions compromise that we included in S. 1714, and that recognizes already the traditional prerogatives of State-regulated professions to guarantee the quality of professional services.

Mr. MILLER. Mr. Chairman, with respect to professions, physicians, lawyers, accountants, other professionals, we police anticompetitive behavior, price fixing, and other restraints on trade boycotts. We also police unfair advertising and deceptive advertising. We also police fraud. We have a history of a number of cases in that area over the past several years.

I would be glad to provide additional documentation of that for the committee for the record.

I do believe that the activities the Commission is engaged in today do meet the standards articulated in that provision of the bill that was reported out of this committee last year.

Senator KASTEN. Recently, in the *Southern Motor Carriers* and *Town of Hallie* decisions, the Supreme Court reviewed the State Action Doctrine and the immunity it provides from Federal antitrust law.

In your view, what is the impact of these decisions on the authority of the Federal Trade Commission, particularly with respect to regulation of the professions? And could these decisions of the court have a bearing on the Agency's enforcement cases involving, for example, title insurance ratemaking bureaus?

Mr. MILLER. OK, let me take that in order. I may forget something; if you will, remind me if I don't respond to it.

Let me say that those decisions, as you point out, did go to the question of State action. Under *Parker* v. *Brown* and the State Action Doctrine, the Supreme Court ruled that a two-part test basically determines exemption or an exlusion from coverage of the Federal antitrust laws; first, whether there has been a State policy to essentially negate competition objectives for some reason; and second, whether the State actively monitors that activity.

Well, what *Southern Motor Carriers* really came down to was a finding that there need not be compulsion to meet that first test. In other words, there could be something short of compulsion in the articulation of a State policy that would meet that first criterion.

I do not see that anything we are engaged in today in the professions area would be abridged by the decisions in the two cases that you raised, and specifically I do not see its abridging—and I have to be very careful how I answer this because, as you know, the title insurance matter is, part 3, before the Commission in adjudication—but at least upon my preliminary review—I do not see those cases as restraining our authority in that area.

Senator KASTEN. I just wanted a quick status report on two things that people have contacted the subcommittee about. The first is the Commission's study of competitive conditions in the retail food industry. It is our understanding that it has now been over 4 months since completion of the agency's hearings on that matter.

What is the status?

Mr. MILLER. Well, it is just like the problem you face here when you hold hearings in the committee, Mr. Chairman. These are ex-

ploratory hearings, these are information-gathering hearings, and we have gone out and asked for a lot of input. Unfortunately, rather than getting some specific data at times that we are hoping to get in these hearings, not surprisingly, I guess, a lot of the comment that we got was more in the nature of complaint than it was in terms of substantive information that we could use to determine if there were a legal violation of law.

And so we have had to supplement those hearings with work of our own. Work is going forward in writing a report to the Commission, to be given to us by the Bureaus of Competition and Economics, but it is not anywhere near completion.

Senator KASTEN. What is your time schedule?

Mr. MILLER. Mr. Chairman, I would hope in the next 3 or 4 months, but it will depend on a number of things. What we have that is of particular interest to us is the development of a new technology. It is not unlike the development of supermarkets.

I remember working for a little grocery store in my hometown, and I remember how the principals used to tell me how at one time it was like a general store. The customer came to the counter and they went back in the shelves and brought out what the customer wanted. But later on they opened it up for people to shop for themselves.

You have a different technology with these warehouse stores, and we needed to get some good information on how they come to get their groceries and what prices they pay for them and their advertising practices and so forth. So it is not easy, and I don't want to move precipitously on something unless we have the real data.

Senator KASTEN. The second issue is——

Mr. MILLER. I mean I would not want to move precipitously anyway, but I mean I wouldn't want to move too quickly.

Senator KASTEN. The second issue that we have had some discussions of and been contacted about is the review of the rule 424. A lot of concern has been expressed about modification of this rule requiring grocery stores to stock sufficient quantities of specials, of advertised specials I should say.

As you know, the committee report accompanying 1714 instructed the FTC to act expeditiously in its review of rule 424, so we have tried to encourage you. What is the status of that?

Mr. MILLER. We have taken the initiative of reviewing that rule and I am troubled because, unfortunately, the general public has a view of that rule that really is not very accurate. For example, many times people will say well, if you eliminate that rule, then you are licensing bait and switch.

Well, the rule has nothing to do with bait and switch whatsoever. Bait and switch would still be a violation of other things. It doesn't violate that rule.

Or people say well, you will do away with rainchecks. But rainchecks have nothing to do with that rule at all. If you give a raincheck, it is not a defense for violating the rule. If you violate the rule, you violate the rule.

So we are reviewing it. We are looking at alternatives, including giving rainchecks, including giving a higher price. The way the rule works now——

Senator KASTEN. I am not asking for a definition of the problem. I am asking for the status of the report and where you are and when we are going to have——

Mr. MILLER. We are very close to having a Commission meeting and making a decision on it.

Senator KASTEN. That means within the month?

Mr. MILLER. I think we will probably make a decision this month.

Senator KASTEN. That would be helpful. Thank you.

Senator Ford.

Senator FORD. Jim, explain to us what the procedure is now in relation to the formulation of a rule or regulation.

Mr. MILLER. The kind of standard that you had in the legislation, S. 1714, last year is the one we follow. We want to make sure that a business practice somebody takes issue with is reasonably prevalent in the industry before we go out and initiate a rulemaking.

The reason for that is very simple. If it is an isolated kind of thing, it is much more efficient for us to go out on a case-by-case basis, and it doesn't worry the honest tradespeople out there who are not involved in that sort of thing.

But if we find something that is a prevalent matter and we make a decision that it could more effectively be dealth with in terms of an industry-wide rule, then we take those initial steps, authorize the Commission staff to make a specific proposal, explore the issue further, and then if the Commission makes a determination that a rulemaking is appropriate, we publish a notice in the Federal Register, and then there are hearing that are held at various places in the country by Commission officials, staff officials, and all of this is put together. It is a very long process.

Senator FORD. Why would you then support the legislative veto after you have gone through this long and tedious procedure?

Mr. MILLER. Well, I think the Commission's authority in some areas is so ill-defined, it's very broad, and I think for independent agencies such as ours in carrying out not only executive kinds of activities but, arguably, legislative activities, it is good for the Congress to have a last review of it.

I am just very concerned. It is the old saw; I am not concerned as long as I am there, but some day there may be reason for concern. And I think the kind of legislative or regulatory veto that I described could move very quickly and would not be a particular encumbrance. I think from the standpoint of those who would be affected by the regulation or the rule, it would be an affirmation of Congress that Congress had put its imprimatur on the rule itself.

Senator FORD. You just stated pressures, I think; another word for pressures. What is the difference between the executive branch pressures and legislative branch pressures?

Mr. MILLER. What I meant—I was harking back to your colloquy here——

Senator FORD. I thought maybe something slipped.

Mr. MILLER. No. Well, maybe. Maybe I was not articulating very well, Senator. I was recalling your colloquy with Senator Levin over the constitutionality matters.

As you know, the first decisions based on *Chadha* the Supreme Court handed down was the FTC legislative veto. It said that in the

FTC rulemaking of the used car matter, the Commission was engaged in an executive branch function. The Court found the legislative veto, the FTC's legislative veto, unconstitutional on the Separation of Powers Doctrine.

Well, the Supreme Court has called that an executive branch function, and in a sense many people say it is legislation when we do rulemaking. So that is what I meant. Whether you call it an executive branch function or a legislative function, or a quasi-legislative function, I think it is a good idea for the Congress and the President, too, to have final look at it.

And we do not promulgate that many rules. I think it would be a reasonably easy device. That is a position I have held for some time. I do not support—in fact, I oppose the so-called affirmative approach.

Senator FORD. What about the Levin-Grassley approach through the appropriations committee.

Mr. MILLER. I oppose them. I think it would be more appropriate to go with essentially the negative option, for reasons that I have argued. And for so-called independent agencies.

Senator FORD. Independent what?

Mr. MILLER. Agencies.

Senator FORD. Do you feel that the Commission has any special responsibility to help preserve an economic environment in which small business enjoy an opportunity to compete against large competitors, or does the FTC disregard size in its examination of the marketplace?

Mr. MILLER. Well, I guess, everything else equal, if everything truly were equal, I would opt for small size on Jeffersonian-type principles. But I think the bottom line is what is written in the law regarding the question of competition.

And really, viewed through the eyes of the consumer, it is a particular business practice where we do have the discretion of determining under a rule of reason whether it's an abridgement of competition, whether it will harm competition? Is it going to raise prices to consumers? Is it going to reduce the scope of choice that consumers face? If so, we will take issue with it.

But size, per se, is not of consequence to the Commission in making that determination

Senator FORD. I have heard for a long time, and I am sure you have, that it is awful hard to beat city hall. And some people have written that the cost involved in legal attempts to prohibit predatory pricing might outweigh the gains.

The idea would seem to be that any legal standard design would excessively restrict legitimate price competition. Do you agree with that?

Mr. MILLER. I think the prohibitions contained in the antitrust statutes as we know them today, combined with the case law as it has developed over time, including some of the case law that we have written at the Federal Trade Commission, are probably the best guides. That is probably the best combination that we have.

You put your finger right on it. How could you circumscribe true predatory pricing without at the same time cutting down on real price competition that benefits consumers by lowering prices to them?

So I think the best way to address those kinds of things is on a case-by-case basis.

Senator FORD. Let me ask you this, then. Do you believe the Commission could adequately legally distinguish legitimate and illegitimate forms of price competition? Do you have any specific standards or guidelines to utilize in drawing distinctions?

Mr. MILLER. Yes. We do. Some of the decisions we have articulated recently indicate that we need to have some evidence that the pricing is below cost and that there is some danger of successful monopolization that would go along with such behavior.

Senator FORD. At some point, does the Commission have jurisdiction or would it look into the low cost of a product, like a price war? Does it ever get to a point where the price is so low that it is too low?

Mr. MILLER. Yes. Yes. Let me just make up a hypothetical.

Senator FORD. OK. Bless you.

Mr. MILLER. Suppose that you had a small town and you had one retail outlet and there was some kind of difficulty with that retailer—in that particular line of commerce—and somebody else is coming in.

If one of the retailers began to price at cost—and we are not talking about loss leaders here. You know the phenomenon of loss leaders. We don't look particularly askance at that. But I mean if there were a pattern of pricing at levels that were obviously below the costs that the retailers pay and it appeared that that kind of strategy was going to be successful in driving out their competitor, and then moreover, and as importantly, when that competitor left, the first firm that raised their prices cut down on the opportunities for consumers and squeezed the consumers in that community, then we would intervene.

Senator FORD. What if you get a request along that line? What would be your procedure to check that out to be sure that the complaint was legitimate or one that you would not readily go and begin to investigate?

Mr. MILLER. Well, that is a very good question. And the reason it is such a good question is that we so often have complaints like that. If you have been in business, you know, you do your best and you wonder how your competitor sometimes can price so low. I guess it is only human nature to say well, if I can't figure out how to cut my cost, I know he is not; he must be trying to horn in on me and he is engaged in predatory pricing.

We have a lot of complaints from firms who allege that their competitors engage in predatory pricing. So we look at indices such as how long has this pricing been going on? What are the circumstances that exist, or are peculiar to that market that suggest that once having driven a competitor out of business, that new entry would be difficult; that is, that it is in the interest of the firm that is alleged to be engaged in predatory pricing? What opportunities do they have to reap monopoly profits as a virtue of their having engaged in predation.

Senator FORD. The small businessman is having a difficult time today. Without naming a product, a small businessman who has been in business for a long time in a community is confronted suddenly with a large chain selling the same product, only $4 or $5

less, and under those circumstances the chain makes as much money under the $5 less as the local small businessman makes charging $5 more.

That is competition, I guess. It does create some real problems with double digit interest today and with small businessmen not having the inventory that is necessary. I find a great deal of hardship on some of our small business people.

Let me just ask one that hasn't seemed to have caught any fire. But Commerce Secretary Baldridge recently recommended that Congress repeal section 7 of the Clayton Act so that corporate mergers can be expedited because of our international trade position.

Now, what is your opinion of that proposal?

Mr. MILLER. Well, Mr. Chairman, let me state for the record, I have the highest regard for Secretary Baldridge.

Senator FORD. You are getting ready to say you are against it.

Mr. MILLER. That is right. But I am against that proposal. I think the antitrust laws, as they are now interpreted by the courts and pursued by the antitrust enforcement officials are sufficiently flexible and enlightened to accommodate the kinds of problems that may have been evident in the past.

I think we are able to compete abroad with the export act legislation that was recently passed, enabling companies to join together and produce or to sell abroad. I think that the merger policies that we have take into account scales of economy.

I think besides that, you have to do something to section 5 anyway of the Federal Trade Commission Act if you were going to restrain the Commission from taking issue with mergers under the same kind of standard that now is contained in section 7 of the Clayton Act.

I think the system works well and with the continuing evolution of case law responding to the latest and best thinking on these matters, I am confident that will continue. I am more confident that it will continue than Secretary Baldridge.

I think the major difference between us in that regard is that he is concerned that at some future time the enforcement policies and the support standards might revert to the situation as it was a couple of decades ago, which would restrain our ability to compete.

Senator FORD. Do you think there would be any confusion as it relates to mergers and takeovers?

Mr. MILLER. Oh, yes, especially if there were nothing done by section 5. People then would be looking for the roll of the die. The Justice Department would not have a section 5, and if the merger went to them, it would be one standard; if it went to the Federal Trade Commission, it might be another. So that would complicate the merger.

Senator FORD. Is the emotion running high enough that something will be done by Congress in the area of junk bonds or takeovers? You are out there talking with people and the consumers all the time.

Mr. MILLER. Senator Ford, I would not be about to suggest that I have more information on Congress' leanings on that than you, sir.

Senator FORD. Well, I am not saying that. I just wanted to know what you have been finding, see if your antenna was up.

Mr. MILLER. My antennae do not suggest that there is overwhelming support for "doing something" about junk bonds.

Senator FORD. There seems to be a lot of legislation introduced.

My last question, Mr. Chairman. What funds will be needed for consolidation of the Commission offices, and why do you recommend the move?

Mr. MILLER. Well, sir, we right now have people in five or maybe four other—well, we have about three-fifths of the people in Washington in our headquarters building, about two-fifths are scattered out over four or five other buildings. In each of those buildings we are the minority tenant. We have short-term leases. We are always in a state of uncertainty.

We have communication problems. Our administrative law judges, our economists, and some of our lawyers are over a mile from the Commission. Dealings with each other, the synergistic effects are not as great as they surely would be if we were consolidated.

We also have opportunities to save the taxpayers millions of dollars by consolidation. We will get rid of a lot of essentially overhead space. We have worked with the administration and with the Congress and we were very close to sealing a deal on a building where the other Washington-based FTC employees would be housed. That fell through at the last minute, and we are in that process again.

We do need certain moneys that would facilitate our move and the installation of certain of our equipment, the communications equipment and so forth. That would be amortized—I mean would not be amortized in the fiscal sense, but in a real sense over time. And the amounts of money I think are around $4 million.

Senator FORD. How many employees do you have?

Mr. MILLER. We have about 1,200 right now.

Senator FORD. How many of them are lawyers?

Mr. MILLER. Well—oh, my goodness. About 700 or 800 are lawyers.

Senator FORD. It couldn't go as high as 900, could it?

Mr. MILLER. It could.

Senator FORD. So you have got 900 lawyers and 300 folks.

Mr. MILLER. Three hundred votes? Is that what you said?

Senator FORD. Folks. F-o-l-k-s. Just plain old hardworking folks.

Mr. MILLER. I am glad you include me in that, Senator, in that rubric "folks."

Senator FORD. Well, I may rethink my statement.

Mr. MILLER. I can get you the data back on it, but we have something on the order of 800.

Senator FORD. Let me say, Mr. Chairman, that Senator Hollings has questions for the Commissioner, and asks that you respond to those expeditiously.

Mr. MILLER. Sure. We will be glad to.

Senator KASTEN. Without objection, the questions from Senator Hollings will be included.

Senator KASTEN. I would like to thank you very much for your testimony. We look forward to working with you.

Mr. MILLER. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Subcommittee: I am pleased to be here to present this statement on behalf of the Federal Trade Commission.

My fellow Commissioners and I strongly believe that reauthorization is the FTC's number one priority. Accordingly, we urge you to move expeditiously on legislation that reaffirms Congress's support for the agency's historic mission.

Mr. Chairman, as you are well aware, the Commission has not been formally authorized since the 1980 FTC Improvements Act expired on October 31, 1982. Since that time, obtaining reauthorization has been elusive. First, there was the battle over the professions; then, the Supreme Court's decision on legislative veto; and finally those who wanted to wait for the 1984 election results. Well, the election is over, and I trust any remaining problems over the professions and legislative veto can be resolved very quickly. We need reauthorization, and we need it now!

Let me hasten to add that last year this Committee crafted a reasonable and practical bill (S. 1714). I hope we have reason to anticipate a similar bill this year and that it will move quickly to full Senate consideration. Because so many important issues face the Congress this year, it is doubly important that the bill move as expeditiously as possible so as not to become one more log in a "legislative log jam."

With your permission, let me now address what I see are the major issues facing us this year. I should add that individual Commissioners do not necessarily endorse all of the positions described here. But what I describe as the Commission's position is the majority view in each case.

UNFAIR ACTS OR PRACTICES

The Commission supports a legislative definition of "unfair . . . acts or practices" along the lines of the unfairness protocol the Commission adopted in December, 1980. As you know, language along these lines are contained in the bill approved by this Subcommittee and the full Committee last year. The Commission specifically supports that language.

JURISDICTION OVER PROFESSIONAL GROUPS

We support language defining the Commission's authority with respect to the professions. We feel it important for Congress to reaffirm the Commission's authority to police anticompetitive, unfair, and deceptive acts or practices in the professions and to indicate precise statutory limits on the authority. We believe the language contained in the bill approved last year by this Committee accomplished these goals.

Without language defining the Commission's authority, the present state of uncertainty will continue for both the Commission and professional groups, resulting in lengthy, costly court battles and prolonging Congressional agony as interest groups continue to revisit the issue. I urge you to settle this now by spelling out the Commission's authority and limits thereon.

LEGISLATIVE VETO

The dilemma facing Congress with respect to its oversight authority in light of the Supreme Court's decision in *Chadha* (June, 1983) has been a contributing factor to the delay in reauthorization. Although we believe reauthorization should not depend on final resolution of the legislative veto question, we support a constitutional version of legislative veto for FTC rulemaking. In general, we support language holding in abeyance any new Commission rule for a set number of days, and expedited procedures for putting a joint veto resolution on the floor of the House and Senate within a reasonable time.

OTHER PROVISIONS

There are several other provisions contained in last year's bill for which I would like to reaffirm our support.

One, we support codification of the *Braswell* standard for knowing violations of FTC orders.

Two, the Commission approves of language requiring it to find that the business practices upon which a rulemaking would be based are prevalent before launching any rulemaking proceeding.

Three, we believe it is appropriate for the Commission to have Civil investigative Demand authority for antitrust matters as well as for consumer protection matters.

Four, we support repeal of the Commission's so-called "public participation" authority. It might have been a good idea in theory, but it didn't work out that way.

Besides, no monies have been appropriated for this purpose in the last five budget cycles.

Five, the Commission approves of language to end the current practice whereby the Commission's cease-and-desist orders are stayed automatically whenever they are appealed.

Six, with regard to certain provisions affecting the Commission's jurisdiction:

While we generally oppose exemptions to FTC authority, we believe the language requiring us to consult with the Secretary of Agriculture in cases involving agriculture cooperatives is acceptable;

Language exempting commercial advertising from rulemaking on unfairness grounds is also acceptable so long as we continue to have rulemaking authority on grounds of deception and may continue to prosecute individual cases on grounds of unfairness as well as deception;

An exemption for credit unions from FTC authority—thus placing them on a par with other federally regulated financial institutions—is altogether reasonable; and

The 1980 Improvements Act language restraining the Commission's ability to take issue with trademarks should be retained.

FUNDING LEVELS

For purposes of authorizing appropriations, we support the Administration's proposed budgetary authority figures of $63.9 million for fiscal year 1986, $64.2 million for fiscal year 1987, and $64.3 million for fiscal year 1988—adjusted upward slightly if need be in the out years to accommodate supplemental pay increases.

Mr. Chairman, that concludes my statement. I will be pleased to address any questions that you or other members of the Subcommittee might have.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS

Question. In response to a question I submitted through the Appropriations Committee about the current need to maintain the exemption for the antitrust laws for the business of insurance, you refuse to respond, on the ground that it would not be appropriate in light of the Commission's January 7 action against six title insurance companies. The question asked was strictly a policy one. Of course a Commissioner is not barred from discussing general issue of policy. *FTC* v. *Cement Institute*, 333 U.S. 683 (1984). Therefore, please discuss your view of the current need to maintain the exemption from the antitrust laws for the business of insurance, as set forth in the McCarran-Ferguson Act?

Answer. The FTC Improvements Act of 1980 prohbits the Commission from conducting nonenforcement investigations of "the business of insurance," unless so requested by Congress. Absent authority to study the policy implications of the McCarran-Ferguson Act exemption, I lack adequate information from which to form an opinion concerning the continuing need for the statute.

I would note, however, that any proposals to repeal the McCarran-Ferguson antitrust exemption should consider the fact that at least some insurance company activities are probably shielded from antitrust scrutiny by the state doctrine as well. Any repeal of the McCarran-Ferguson Act, therefore, would have an uncertain effect.

Finally, I would note that, in investigations involving the McCarran-Ferguson Act, I have instructed the staff to apply the law as it exists, and not to attempt to change it.

Question. Has the FTC ever conducted a study of the after effects of a major predatory pricing war in any of the alleged markets? If not, how can the Commission substantiate the proposition that prices remain low when it has no information on whether prices have gone lower, higher or stayed the same? Wouldn't it seem to be more effective for the Bureau of Economics to conduct such a study to determine what the long term price impacts are for the consumers, rather than some of the other economic studies that are taking place?

Answer. The legal and economic literature is replete with studies of predatory pricing. See, e.g, Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Review 105 (1971). Although the literature reflects differences of opinion concerning the legal standards that should be used to analyze allegations of predation, there is general agreement that successful predation can only exist when market conditions) i.e., pricing responses by incumbents and prospects for new entry—permit the predator to recoup the costs of its predatory campaign through the increased prices after rivals have exited the market. The empirical studies have shown few, if any, true cases of predation. *See*, Hurwitz and Kovacic, *Judicial Anal-*

ysis of Predation: The Emerging Trends, 35 Vanderbuilt L. Rev. 63 (1982), and cases and articles cited therein.

I am not aware of any specific Commission studies of prices before and after a period of alleged predatory pricing. Accordingly, I view your suggestion as a good one. However, I would note that in the context of our law enforcement investigations involving predation, we always seek the best available "before and after" evidence. For example, in connection with our on-going study of grocery industry pricing practices, we have selected five markets for in-depth study. Those markets were selected so that w may evaluate pricing conditions over a relatively protracted period.

Question. Is selling below cost a potential offense under the antitrust laws? If so, what circumstances are involved? Particularly, for what length of time might below cost selling continue before becoming subject to antitrust legal coverage?

Answer. Selling below cost may constitute an antitrust offense in certain circumstances. The Commission addressed the issue of so-called predatory pricing in recent cases involving General Foods Corp.[1] and ITT Continental Baking Company.[2] In the latter case, the Commission described its predatory pricing standard as follows:

"Sales at prices that equal or exceed average variable cost should be strongly, often conclusively, presumed to be legal.[3]

"Sales at prices below average variable cost for a significant period of time should be rebuttably presumed to be anticompetive.[4]

"Sales at prices that equal or exceed average total cost should be conclusively presumed to be legitimate" [5]

In a separate opinion, Commissioner Bailey, joined by Commissioner Pertschuk, stated that "no one cost standard is always appropriate; rather, the market setting dictates the choice," [6] and agreed that "in some market conditions prices in the zone between [average total cost] and [average variable cost] can be legitimate.[7]

Note, however, that a determination that a given firm has sold at predatory prices for a significant period of time does not in and of itself establish liability under the Sherman or Clayton Acts. It satisfies the "specific intent" and "anticompetive conduct" components of antitrust's attempted monopolization prohibition, but does not, without more, satisfy the "dangerous probability of success" requirement.[8]

As noted above, sales at prices below average variable cost for a significant period of time are rebuttably presumed to be anticompetitive. It is difficult to determine precisely the duration of a qualifying period, but it should be sufficiently long to make it likely that sales at such prices could in fact force equally efficient firms to exit. Discontinuous or episodic instances of sales at such prices are unlikely to satisfy this standard because they may well be nothing more than responses to fluctuating demand and are unlikely to be to harm equally efficient firms.

Question. What rules, if any, will the Commission apply to cross-subsidization of individual units within a large firm? For example, is it acceptable under current Commission legal interpretation, is it acceptable under current Commission legal interpretation for the profits of a large number of stores in one city to be utilized to subsidize the artificially low, below-cost profits prices of stores in another city? (b) Under what circumstances does the Commission accept and approve of such oper-

---

[1] *General Foods Corp.* 3 Trade Reg. Rep. (CCH) ¶ 22,142 (April 6, 1984).

[2] *ITT Continental Baking Company, Inc.*, 3 Trade Reg. Rep. (CCH) ¶22,188 (July 25, 1984) Bailey and Pertschuk, Commissioners, concurring in part and dissenting in part.

[3] *ITT Continental Baking Company, Inc., supra* note 1, at 23,082. This presumption could possible be rebutted in some circumstances by a strong showing that sales at such prices were not, absent the effect of the alleged predation, consistent with profit maximization or loss minimization. Consistent with the Commission's position, commentators have discerned a trend in recent appellate court decisions toward presuming that prices between average variable cost and average total cost are legal, subject to rebuttal through a rule of reason analysis. Calvani and Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction*, 51 Antitrust L.J. 375, 396 (1982); Hurwitz and Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 Vand. L. Rev. 63, 99–110, 149–50 (1982).

[4] ITT Continental Baking Company, Inc., supra note 1, at 23,082. This presumption could be rebutted by showing, for example, that the sales at issue (a) were of products that were obsolete, perishable, or otherwise subject to rapid value deterioration, (b) were at introductory prices designed to induce trial, or (c) were made to avoid losing goodwill that would be very costly to regain were the firm to shut down and then reopen later.

[5] *Id.* at 23,083.

[6] *Id.* at 23,113 (Bailey, Commissioner, concurring in part and disenting in part).

[7] *Id.* at 23,112.

[8] Attempted monopolization has three principal elements: (1) specific intent to control prices or destroy competition, (2) exclusionary or anticompetitive conduct, and (3) dangerous probability of success. *E.I. DuPont de Nemours & Co.*, 96 F.T.C. 653, 725 (1980).

ations? Similarly, is it acceptable practice in the Commission's view for differential pricing policies to be practiced by a single firm's stores within the same city? Can company stores on one, less competitive, side of a city charge higher prices to assist their corporate allies in another, more competitive part of the city, with artificially lower prices? (c) What legal or policy justification would the Commission advance for allowing such practices to continue?

Answer. Charging different prices in different geopgrahic areas or to different customers does not automatically violate the antitrust laws. Differential pricing may, of course, be a form of predatory pricing confined to sales in a localized market. In such cases, the Commission applies its normal analysis to determine whether the pricing in question constitutes attempted monopolization in violation of Section 2 of the Sherman Act or violate the Robinson-Patman Act. The Robinson-Patman Act makes it illegal to charge discriminatory prices where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. Price differentials are not illegal, moreover, if they are made in good faith to meet an equally low price of a competitor, if the differences are cost justified, or if the differences are made to meet variations in market price or changes in the sale-ability of goods.

Question. Do you believe that the state action exemption applies to the Federal Trade Commission's exercise of its antitrust authority even without additional legislation?

Answer. The Commission's antitrust cases have traditionally been pursued as if they were Sherman Act cases. As such, the state action doctrine has been assumed to apply. The Commission's extensive discussion of state action issues in *Massachusetts Furniture & Piano Movers Assn.*, 102 F.T.C. 1176 (1983), reflects this view.

Question. While I understand you cannot comment on any specific issues involving the adjudicatory phase of any proceeding, I would like to ask you several questions about the reasons the FTC initiated the title insurance proceeding: (a) Why did you vote to begin the proceeding while the *Southern Motor Carriers* could be dispositive of the title insurance proceeding because the rating bureaus at issue were identical. Don't you think it was a waste of FTC resources and manpower to initiate a case which may become moot? (b) Before you initiated the title insurance proceeding, the title companies began to withdraw voluntarily from the rating bureaus. (They took this action to minimize any exposure to treble damage suits which they expected to follow any FTC action.) A voluntary withdrawal from rating bureaus gave you the injunctive relief your enforcement proceeding was seeking. Why then did you vote to proceed with the case?

Answer. [Despite Chairman Miller's desire to be as helpful as possible, this response has not been reviewed by him or by the Commission; instead, it has been prepared by the Bureau of Competition staff because the question involves a matter in adjudication.]

Prior to commencing the *Ticor* case, the staff carefully considered the potential impact of a Supreme Court ruling in the *Southern Motor Carriers* matter. *Southern Motor Carriers* presented the question whether private parties could avail themselves of the *Parker v. Brown* defense absent state action compelling the challenged activity. Absent the compulsion requirement, state action claims would be evaluated under the two-pronged test articulated in *California Retail Liquor Dealers v. Midcal Aluminum, Inc.* In that case, the Supreme Court held that conduct must be *both* undertaken pursuant to a clearly articulated state policy to displace competition *and* actively supervised by the state to receive state action immunity. Under the generally understood interpretation of *Midcal*, the joint rate-setting activities of title insurers with respect to search and examination services did not appear to constitute immune state action. Consequently, there was reason to believe that the title insurance complaint could be sustained whatever the result in *Southern Motor Carriers.*

Although the *Southern Motor Carriers* decision places a new interpretive gloss on the state policy prong of the *Midcal* test, it does not necessarily follow that the activities challenged in *Ticor* qualify for state action protection. Whether the title insurers' activities qualify for the exemption will depend on a detailed analysis of regulatory situation in each state. Indeed, the title insurers have acknowledged in court papers filed in the case that it would be premature for them to move for dismissal on state action grounds.

Prior to the issuance of the complaint, the insurers did not press arguments concerning the state action doctrine or the possible outcome of the *Southern Motor Carriers* decision. This may have been because of the decision in *United States v. Title*

Insurance Rating Bureau of Arizona. In that case, which involved a direct government challenge on joint rate-setting for settlement services, the court of appeals rejected the insurers' state action defense. The Supreme Court declined to review this case on the same day that it granted review in *Southern Motor Carriers*.

With respect to the decision to bring suit rather than rely on the companies' assurances, the Bureau of Competition believed that the Commission could not obtain and ensure effective relief in this case absent issuance of the complaint. Although the six insurance companies indicated that they would voluntarily withdraw from the rating bureaus if the Commission would withhold issuance of the complaint, the companies refused to enter into a formal consent order agreeing not to fix prices on search and examination and settlement services.

In 1977, the Commission formally revised its rules to delete provisions which previously had provided for voluntary assurances of compliance with the law under certain limited circumstances (which, in any event, were not met here). The rule revision was made because experience had demonstrated the inadequacies of monitoring and enforcing these voluntary assurances.

In this case, a number of additional factors were present that indicated an enforcement action was necessary. First, our investigation was conducted on a voluntary basis, and the voluntary approach was not completely successful in that the companies refused to cooperate fully with our requests for information. Second, the companies to this day continue to maintain that the Commission is without jurisdiction to investigate any of their activities. Third, after the Ninth Circuit held that price fixing on escrow or settlement services in Arizona was unlawful, *United States v. Title Insurance Rating Bureau of Arizona*, 700 F.2d 1247 (9th Cir. 1983), the companies continued to fix prices an all or part of these services in other states. Finally, even though the companies were resigning from rating bureaus, it appeared that little, if any, independent analysis was being given to their "new" rate structures, and that the companies at times were simply "independently" adoptng the rate structures upon which they had agreed with each other.

Senator KASTEN. The next witness is Mr. Joseph.

[Pause.]

Senator KASTEN. The committee will come to order. Our next witness is Mr. Jeffrey Joseph, the vice president for domestic policy, the Chamber of Commerce.

Mr. Joseph.

STATEMENT OF JEFFREY JOSEPH, VICE PRESIDENT FOR DOMESTIC POLICY, CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. JOSEPH. Thank you, Mr. Chairman. I appreciate the opportunity to be here and request that my formal statement be included in the record. I would like to quickly summarize.

The chamber, as the broadest based business organization, supports necessary modifications in the FTC act which would guide the Commission in its efforts to enforce vigorously safeguards for business competition as well as legitimate rights of consumers.

Most important, we view this reauthorization process as an opportunity to codify policies which will be mutually beneficial to both consumers and the business community. The principal message we wish to bring here today is that the business community and consumers are well aware of the climate of uncertainty and confusion that have operated for the last several years regarding the status of the jurisdiction of the FTC.

And we believe that the lack of reauthorization is leading to confusion over more than just the definition of unfair deceptive acts or practices or the status of those improvements that were put into law in 1980. We believe it is creating doubts around the country as to what the very role of the FTC is.

And as we continue to take the pulse of our membership on the FTC reauthorization and the message they want the U.S. Chamber

to bring before you, it is that the business community wants a reauthorization bill this session of Congress. We would like to see the big issues, the structural issues focused on. When I say structural issues, I mean the cloudy word unfairness addressed both in the consumer protection and the competition side, because that has in the past led to many problems for the Commission.

We are pleased with the progress that has been made by this committee's efforts to work on the definition of that term, and we are encouraged by the way that is going. We also list in our statement a number of other positions that we have. We support, obviously, continued oversight over the FTC. We have historically supported legislative veto, preferably from our perspective, the strongest kind which we could find, which has traditionally been the approval mechanism.

We are aware, obviously, of the political debate that has surrounded this issue. We are also aware of the positioning of the legislative veto issue with regard to the FTC reauthorization itself, and we are trying to work with you and all other parties to make sure that the legislative veto does not stand as a roadblock to the reauthorization bill going through.

We will continue to look at the various proposals on the legislative veto that are brought forward, such as that that Senators Levin and Grassley brought to you this morning. We will continue to speak with Jim Miller and others at the FTC about their ideas, with the idea of trying to harmonize a consensus position on legislative veto.

But we come here today with the basic message of we want a reauthorization, we want to see the term unfairness defined, we want the safeguards from the 1980 Act reauthorized, and we have not turned our back on legislative veto, but want to work with the Congress in making sure both issues are resolved.

And let me just also add, because of your next panel, we do not have a position on the professional issue.

Senator KASTEN. S. 1714 contained a definition of unfair acts or practices and a number of other reforms which you refer to in your statement.

Is it correct, then, that the Chamber of Commerce supports an FTC authorization along the lines of S. 1714?

Mr. JOSEPH. Oh, I would not want to get pinned down right now in the entire bill. We would like to work very much with you on that definition. We think we are in the same ballpark. We feel that our position is very close to the FTC's position on the definition of unfair acts and practices, and I think that with regard to that section of the bill, we are just about there.

Senator KASTEN. Thank you.

Senator Ford.

Senator FORD. I hate to be placed in the position of the only one that is asking questions today, because I will be accused of causing the hearing to run longer than it should.

Are you and your people convinced that the Levin-Grassley proposal on legislative veto is constitutional?

Mr. JOSEPH. Let me just say that we have not studied the Levin-Grassley mechanism that has a string on the appropriations process. It is something we just heard about relatively recently. We be-

lieve that the constitutional argument is basically resolved by getting both houses of Congress to affirmatively pass something with the signature of the President.

We feel that those are the parameters that define the constitutional question around legislative veto.

Senator FORD. Well, one of the problems I had with the previous one was that it was unconstitutional. It took years, you know, to finally agree that it was, after it went through our judicial process.

I would hope that the chamber would be very cautious about supporting language that would interfere with our appropriations process. We have the ability, as you probably heard me earlier say, to withhold funds at any time as it relates to carrying out a certain item, and that would prevent it from happening.

I am very concerned that the mechanism proposed as it relates to the President might result in vetoes of appropriations bills. And I don't believe we want to get into that kind of a procedure.

Mr. Chairman, I don't believe I have any further questions. The statement is thorough. And you set it out pretty well. It is even patriotic.

Mr. JOSEPH. That is what we are here for, is to wave the flag for business, but more so to remind this committee that this a very important agency to the public and to business, and just for the record, the U.S. Chamber, in 1914, did affirmatively support the creation of the FTC as a valuable mechanism to ensure competition in the economy.

Senator FORD. I served on the U.S. chamber board at one time, so let me ask you, will this bill be on your list whether we vote right or wrong?

Mr. JOSEPH. Yes, sir.

Senator FORD. This will be on your list.

Mr. JOSEPH. Yes, sir.

Senator FORD. Well, at least we know of one bill that is going to be chosen.

Mr. JOSEPH. Well, with one condition, Senator.

Senator FORD. Oh, now we get a condition.

Mr. JOSEPH. To make it through our list, it requires some affirmative action on your part. There has to be a floor vote.

Senator FORD. Well, I understand that.

Mr. JOSEPH. I am assuming there will be a reauthorization. In other words, if this language is again, it may not make it to the list.

Senator FORD. That is right. And the last time it was reauthorized was 1980. And we had a little fun getting some things in there that time.

Mr. JOSEPH. Yes, sir.

Senator FORD. And we made a lot of changes, a lot of corrections. I thought we did a pretty good job. Many of them will be included again in legislation this year.

Mr. JOSEPH. We agree, and we want to reauthorize some of those concepts.

Senator FORD. We will just challenge everybody to get it done. So let's not put something on there that would jeopardize the reauthorization. Put it on something else.

Mr. JOSEPH. We hear you.

Senator FORD. And if the appropriations bill position is going to be the controversial issue, and we might put the President in the position of questioning whether he can sign or not sign the appropriations bill, where are we? So, why take a chance?

Thank you, Mr. Chairman.

Senator KASTEN. Mr. Joseph, we look forward to working with you as we develop this legislation, and I think if we can get through this professions hurdle and the legislative veto hurdle, and I am optimistic that one way or the other we are going to find a solution to both, we will then, in fact, have a vote on the floor with something very close to 1714.

Thank you very much.

Senator FORD. Let me ask you before you leave, though, do you have any ability to be an arbitrator as it relates to the professions?

Mr. JOSEPH. Probably not.

Senator FORD. Probably not?

Mr. JOSEPH. Probably not.

Senator FORD. All of them are my friends.

Mr. JOSEPH. They are ours, too, and we want to keep them.

Senator FORD. And I find it is very difficult to get my friends to agree. I went to a bar meeting one night, their annual meeting, and they wanted to draft a resolution for Law Day. The dinner started at 7, I left at 11:45; they were still arguing over the language of the resolution for Law Day.

I make that as a point because each group I think is going to have to give and take a little bit. Some now decide they don't want any language; others want language. And it makes it very difficult to help your friends.

I just wondered, since they are all your friends, if you are going to take the high road and not try to solve our problem?

Mr. JOSEPH. For the time being, our friends want to stay our friends, and we would like to keep it that way.

Senator FORD. Sometimes the bonds of friendship are strengthened by the ability to help.

Thank you, Mr. Chairman.

Senator KASTEN. Thank you.

[The statement follows:]

STATEMENT OF JEFFREY H. JOSEPH FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. Chairman and members of the Subcommittee, my name is Jeffrey H. Joseph. I am Vice President of Domestic Policy at the U.S. Chamber of Commerce. The Chamber of Commerce is the world's largest business federation of business companies, chambers of commerce, and trade and professional associations. The U.S. Chamber of Commerce appreciates this opportunity to share our views on the Federal Trade Commission (FTC) reauthorization.

We support necessary modifications in the FTC Act which would guide the Commission in its efforts to enforce vigorously safeguards for business competition as well as the legitimate rights of consumers. More important, we view this reauthorization process as an opportunity to codify policies which will be mutually beneficial to consumers and the business community.

For several years, the business community and consumers have operated in a climate of uncertainty and confusion with respect to the jurisdiction of the FTC and the standards of behavior deemed appropriate by the FTC. Lack of FTC reauthorization for the past three years has led to confusion over more than just the definition of "unfair or deceptive acts or practices" or the status of FTC improvemetns which were enacted in 1980; it has created doubt as to the very role of the FTC. The issues

before us, which have been studied and debated extensively and in many cases even decided, are too important to leave in such an indefinite state. Yet, without a FTC reauthorization, without a clarification of the Act, the confusion continues.

The FTC, under the leadership of Chairman James Miller III, has made substantial improvements in providing clarity regarding the proper role of the agency. We commend Chairman Miller and the FTC for these improvements. But the Chamber, like the FTC, recognizes the appropriateness of having Congress provide as much guidance as feasible to administrative agencies. When the Chamber testified before this Subcommittee in 1982, we recommended specific legislative solutions to long-standing problems. We believe our legislative proposals are even more appropriate today. Therefore, we reiterate our support for them and attach our 1982 statement for the hearings record.

An overriding concern today is the uncertainty which surrounds the definition of the term "unfair or deceptive acts or practices" under Section 5 of the FTC Act. Controversy continues over what exactly constitutes "unfair or deceptive acts or practices." We are aware of past instances where the FTC operated essentially unrestricted in determining what constituted "unfair" methods of competition or "unfair or deceptive acts or practice." The business community and other interested parties take little comfort in the fact that the current FTC defines these terms narrowly. No guarantee exists that future FTC's will give these terms a narrow, strict contruction.

The Chamber proposes to define "unfair or deceptive acts or practices" under Section 5 to be those which: "* * * directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition * * *"

The Chamber's proposal would not impair the FTC's ability to prevent actual "unfair or deceptive acts or practices." Rather, it provides clarity and certainty to an area of the law which, if left unaddressed, will continue to confuse business and consumers as to the required standard of behavior.

The definition of "unfairness" and "deception" certainly is not the only concern of the business community. In the past, the FTC has intervened in areas under the color of its Section 5 "acts or practices" authority even where Congress indicated that a particular regulation was unnecessary. The Chamber's proposed legislation would address this problem by prohibiting FTC exercise of its Section 5 "acts or practices" authority in areas under the direct regulatory authority of another federal agency.

With respect to the FTC's power to prevent "unfair methods of competition," no statutory standards exist for determining what is and is not an "unfair method of competition." The Chamber's proposal will not affect the FTC's traditional enforcement of the Sherman, Clayton, and Robinson-Patman Acts. But it will define the boundaries of such jurisdiction.

The Chamber also supports repeal of Section 5(m)(1)(b) which imposes $10,000 penalties on companies for violating cease and desist orders, even where the company fined was given no opportunity to be heard in the original controversy. Basic fairness requires that the FTC be prepared to litigate the issues fully against all businesses which may be affected by civil penalties.

We continue to support increased Congressional oversight of the FTC. Regular oversight, within the scope of the law, provides a better check on agency rulemaking and helps to prevent regulatory abuses.

Also, we support preservation of those safeguards contained in the 1980 FTC Improvements Act which prevent abuses in the FTC's administration of its intervenor funding program.

Overall, the Chamber believes the above-mentioned reforms and those outlined in our attached statement are essential to providing a more predictable climate for businesses and consumers. These reforms are timely; they will provide necessary guidance to the FTC and allow the FTC to play a vital role in protecting competitive business practices and the interests of consumers.

Finally, we reemphasize the need to reauthorize the FTC during this Congressional session. We hope that this Subcommittee and, more generally, Congress will take swift action to reauthorize the FTC.

Statement of Martin F. Connor

Mr. Chairman and members of the Subcommittee, my name is Martin F. Connor. I am Washington Corporate Counsel of the General Electric Company and also a

member of the FTC Subcommittee of the U.S. Chamber's Council on Antitrust Policy. We on the Subcommittee are responsible for assisting in the development of the Chamber's position on issues affecting the Federal Trade Commission. Accompanying me today is Fred Byset, the Chamber's Associate Director of Government and Regulatory Affairs for Antitrust.

The Chamber of Commerce of the United States is the world's largest business federation of corporations, trade associations, chambers of commerce and individuals engaged in business and the professions. On behalf of our more than 225,000 members, we greatly appreciate this opportunity to share our views on the proper role of the Federal Trade Commission in our competitive economy.

In the Chamber's view, Congress, and this Committee in particular, should act affirmatively to chart the future course of the Commission's administration of Section 5 of the FTC Act. Although widely criticized in recent years, the FTC has a useful role in enforcing the nation's antitrust laws and in protecting the individual consumer against commercial misconduct. The scope of this role, however, should be more precisely defined by the Congress and not be left to the discretion of the individuals who at any given moment constitute the Commission. While the Chamber applauds the emphasis on economic analysis and the respect for market forces brought to the Commission by Chairman Miller and his staff, we cannot ignore the prospect that those contributions may be nullified in the future. We therefore urge the Congress to provide more certain guidance to all future Commissions and to the courts which will review their actions.

Under its vague and undefined Section 5 "unfairness" authorities, the FTC has claimed vast and potentially arbitrary power to intervene broadly in the market. While FTC orders are subject to judicial reveiw, the elusive nature of the "unfairness" concept gives the courts no standard by which to assess the validity of FTC action. Thus, the courts have been largely relegated to a limited review of evidentiary and procedural issues. Generally, as long as the Commission follows prescribed procedures and marshalls some evidence of record to support its position, the ultimate conclusion as to what does or does not "violate" Section 5 is effectively insulated from judicial scrutiny.

Given these inherent limitations on court review under the existing statute, and the political pressure generated on the Commission by the vagueness of its own mandate, the need for Congressional action is immense. Congress bears the ultimate constitutional responsibility for FTC actions since the agency is wielding power delegated by statute. As the Commission itself has recently recognized, it is "entirely proper" for Congress to "provide as much guidance as feasible to administrative agencies" in the form of more precise statutory standards for the benefit of both the "regulated" and "regulator".[1] In the same manner, the Chamber also believes it both timely and appropriate for Congress to clarify the broad delegation under Section 5 and thus to set the Commission on a Congressionally-defined and bounded course.

A little more than two years ago, Congress undertook a review of the operations and policies of the FTC resulting in the FTC Improvements Act of 1980. At that time, the Commission, under different leadership, was pursuing regulatory initiatives which intruded into the affairs of industry and commerce from one end of society to the other. In the name of consumerism, the FTC was scrutinizing activities from children's advertising to funerals in an effort to provide cradle to grave protection, while in the area of borader economic regulation, it claimed Section 5 legal authority to restructure entire industries, without antitrust violation, to meet its own notions of market structure and performance.

In response to this situation, the 1980 Improvements Act contained a variety of loosely related provisions ranging from specific restrictions on ongoing proceedings to new agency procedures. Some of the provisions were permanent in nature. While others—including many which the Chamber believes should now be made permanent—were effective for only a specific period. The 1980 legislation did not attempt to address the more fundamental problem inherent in the FTC's undefined and open-ended Section 5 mandate.

In recent months, the Chamber has given long study and careful thought to the directions this Congress might give the FTC. We have reviewed the various proposals advanced, and in many cases adopted, in connection with the 1980 Improvements Act and have come to the conclusion that reform must go beyond procedure and ad hoc review of individual proceedings. We believe that Congress must now

---

[1] Letter of Commission, per Chairman Miller, to Senators Packwood and Kasten dated Mar. 5, 1982 at pp. 8-9.

take a hard look at the FTC's basic Section 5 authority in both antitrust and consumer protection and redefine the agency's power by enacting meaningful substantive standards in the governing statute.

The U.S. Chamber, in consultation with other leading business groups, has prepared draft legislation designed to achieve this objective which we now submit for this Committee's consideration. (See Appendix A hereto.) In our view, the concepts incorporated in this draft legislation could provide a sensible, long-term means for revitalizing the FTC in its legitimate regulatory sphere.

In the antitrust area, for example, the FTC's generally repudiated efforts at activist economic regulation reflected, to a large degree, confusion on the part of the agency as to its proper enforcement role. Not wishing merely to duplicate the activities of the Department of Justice and without meaningful guidance from Congress, the FTC during the 1970's began probing the outer bounds of its Section 5 "unfairness"/antitrust authority. This search for a specific mission, unfortunately, led the agency into a series of ill-conceived and adventurous proceedings, such as the cereal and automotive industry, cases, which absorded enormous Commission and private resources and raised widespread concern that the FTC regarded itself as a centralized economic planning agency.

The Chamber's proposed legislation is designed to return the FTC's Bureau of Competition to the mainstream of antitrust enforcement. It would require the agency to observe established Sherman Act principles in Section 5 cases and, in this way, would provide meaningful guidance to the Commission and to reviewing courts. The proposal would reemphasize the role of antitrust, with this focus on market freedom, as the major instrument of competition policy, foreclosing the pursuit of nebulous "social" objectives. In a larger sense, the Chamber's proposal contemplates a long-term accommodation between a Justice Department focused on per se offenses and an FTC focused on complex, rule of reason cases where administrative expertise and remedies are paticularly appropriate.

Similarly, in the consumer protection area, the Chamber's proposed legislation incorporates specific standards to govern the FTC's exercise of its "unfair or deceptive acts or practices" jurisdiction. The proposal essentially leaves intact the FTC's authority to strike down falsehoods, reckless claims, or practices that are intentionally misleading. Such conduct has no place in our free enterprise system and the FTC, under the Chamber's draft language, would be fully empowered to prevent it.

When, however, the Commission moves beyond reprehensible conduct and seeks instead to attack business practices because of an alleged adverse impact on consumers, the Chamber's proposal would provide it with substantive guides to bring agency action within proper bounds. The Chamber believes that the Commission should intervene on an impact basis only when the alleged injury to consumers is substantial and not reasonably avoidable and then only when the benefits of government intervention outweigh the costs which such intervention would impose on consumers and the competitive systems. Significantly, these guideposts in the Chamber's proposal are the very same criteria that the FTC itself recommended, only two weeks ago, as appropriate elements in a more precise statutory definition of "unfairness."[2] The Chamber thus basically accepts the Commission's own formulation which, we believe, expresses the appropriate statutory limits of the agency's consumer protection jurisdiction.

Consistent with and complementary to our substantive proposal, the Chamber is proposing two additional modifications to Section 5. First, we believe that the Congress should make clear to the FTC that its consumer protection jurisdiction does not overlap the jurisdiction of specialized regulatory agencies and should focus on commercial practices rather than health or safety problems. Second, we urge the repeal of Section 5(m)(1)(B) which authorizes the Commission to seek civil penalties against companies for violations of cease and desist orders entered without notice to them and without an opportunity for them be heard. The costs of Section 5(M)(1)(B) clearly outweigh any possible enforcement benefit.

I. CONTINUATION OF CERTAIN PROVISIONS OF FTC IMPROVEMENTS ACT OF 1980

As legislation arising in part out of the appropriations process, several of the provisions in the FTC Improvements Act of 1980 were tied to the expenditure of agency

---

[2] Letter of Commission, per Chairman Miller, to Senators Packwood and Kasten dated Mar. 5, 1982 at pp. 7-9. Only Commissioner Pertschuk did not share the view of his fellow Commissioners that new statutory standards would be appropriate. Nonetheless, even he agreed that should Congress adopt new legislation concerning "unfairness", it should properly include the concepts of substantiality, unavoidability, and cost-benefit analysis.

funds during designated fiscal periods. Therefore, absent congressional action, certain key aspects of the 1980 Improvements Act will expire at the end of the current fiscal year.

The U.S. Chamber strongly supported many of these provisions during the hearings leading up to the enactment of the 1980 legislation. The Chamber continues this support and urges that the provisions identified below be incorporated in the FTC's organic statute.

The reasons justifying the original adoption of these provisions in the 1980 Improvments Act are fully set forth in the hearings and debates that preceded that legislation and need not be repeated here. Experience during the last several years under the new legislation, however, has fully confirmed their appropriateness.

Specifically, the National Chamber believes that the following portions of the FTC Improvments Act of 1980 should now be made a permanent part of the FTC's governing statute:

1. Intervenor Funding Limitations.—While the Chamber believes that all interest groups, and particularly consumers, should be represented in agency proceedings, Congress found that there had been serious abuses in the FTC's administration of intervenor funding, including selective disbursement to groups in agreement with the FTC's position, staff preparation of written statements for so-called "public" witnesses, and funding of unqualified individuals and groups. Congress adopted important safeguards in this area in the 1980 Improvements Act which should now be continued.

2. Prohibition of "Unfairness" Rulemakings with Respect to Commercial Advertising.—The Chamber has consistently criticized the FTC's use of rulemaking to "legislate" broadly with respect to so-called "unfair" acts and practices. "Unfairness" is an elusive and amorphous concept which becomes even more tenuous when pursued in an unfocused rulemaking process. As the children's advertising and similar proceedings have demonstrated, "unfairness" rulemaking with respect to commercial advertising is particularly suspect and raises issues of constitutional dimension. Congress properly prohibited such activities in the 1980 Improvements Act, a prohibition that should now be incorporated on a permanent basis.

3. Congressional Oversight.—The current authorization act contemplates regular Congressional oversight of the Commission, including pre-enforcement review and possible veto of the agency's rules. We supported this concept in the 96th Congress as an effective mechanism for insuring compliance with Congressional intent, and we urge renewal—not inconsistent with constitutional considerations and a proper balance of legislative and executive branch authority.[3]

While Congress should take prompt affirmative action with respect to each of these items, the Chamber does not believe that continuation of these 1980 Improvements Act provisions is a substitute for providing substantive content to the Section 5 standards and meaningful direction to the FTC in carrying out its antitrust and consumer protection missions.

II. CLARIFICATION OF THE FTC'S POWER TO PREVENT "UNFAIR METHODS OF COMPETITION"

The first important aspect of the Chamber's proposed legislation concerns FTC antitrust enforcement under its Section 5 authority to prevent "unfair methods of competition." The Commission has operated under this broad and essentially unrestricted "unfair methods" mandate for almost seventy years. Although originally interpreted in a manner generally consistent with the mainstream of antitrust enforcement, this authority has been used repeatedly by the FTC during the last ten years to justify new programs of activist regulatory intervention in the nation's economy.

The crux of the problem is the absence in the statute of objective standards for determining what is and is not an "unfair method of competition." Because of this critical failure, the FTC has had relatively little meaningful judicial review and has often felt free to attempt to impose on the business community the policy preferences and social priorities of incumbent Commissioners and staff. Moreover, the lack of substantive limitations in the Commission's statutory authority has exposed

---

[3] The Chamber also generally supports continuation of one other aspect of the 1980 Improvements Act, i.e., limitations on FTC participation in trademark cancellation proceedings, which is also scheduled to lapse at the end of the current fiscal year. Trademark cancellation proceedings concerning whether a mark has become a "common descriptive name" can be exceedingly long and complex. In the Chamber's view, FTC involvement in such proceedings represents a waste of the Commission's scarce resources, especially as affected industry members already have a strong incentive to protect their own interests in such matters.

the Commission to pressure to remedy any economic condition which a politically powerful faction regarded as an "evil."

The Chamber's proposed legislation would remedy this situation by incorporating into Section 5 of the FTC Act the established body of judicial precedent under Sections 1 and 2 of the Sherman Act. By thus directing the FTC to adhere to Sherman Act standards as defined by the Court, the Chamber's proposal would effectively eliminate the FTC's roving antitrust "unfairness" mandate.

A. The Need for Objective Standards for Determining "Unfair Methods of Competition"—

In vesting the FTC in 1914 with jurisdiction to prevent "unfair methods of competition," Congress acted in the context of and in response to prior judicial decisions under the Sherman Antitrust Act. The Federal Trade Commission Act was enacted in reaction to the Supreme Court's adoption of the "Rule of Reason" standard for judging the legality of trade restraints under Section 1 of the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911). The *Standard Oil* decision was not well received in Congress where it was viewed as a weakening of the Sherman Act prohibitions. Accordingly, Congress invested the FTC with broad "unfair methods of competition" authority to counteract the perceived potential for judicial emasculation of the Sherman Act.[4]

Obviously, much has changed since 1914. Sherman Act enforcement has not withered away, but has instead evolved over the years a rich and substantial body of precedent which defines, with reasonable predictability, our national competition policy. Indeed, expansive judicial interpretations of pertinent Sherman Act doctrines [5] have made the statute a very powerful and adaptable weapon against all forms of anticompetitive abuse.

This evolution of Sherman Act principles has essentially mooted the original 1914 Congressional concerns that gave rise to the FTC's vague "unfair methods of competition" authority. At the same time, the intervening years—and especially the decade of the 1970's—have witnessed a series of dubious FTC proceedings that manifest the dangers inevitably created by an undefined and open-ended legislative mandate. These proceedings include:

1. *"Shared Monopoly Cases"* in which the FTC attacks industry structure arising, without collusion, in the market and seeks to reshape industries to meet the FTC's regulatory notions of optimum restructuring. The Chamber is acutely conscious that the *Cereal* case [6] ended in a precedential "draw" with three Commissioners refusing to foreclose a rerun in a more propitious political climate.

2. *"Bigness is Badness Cases"* in which the FTC attacks large companies on social grounds and seeks to limit their growth and efficiency advantages. The now terminated, but never legally repudiated, oil industry proceeding and automotive investigation are recent examples.[7]

3. *"Noncollusive Parallelism Cases"* in which the FTC attacks commercial practices arising pervasively, without collusion, in the free market and attempts to dictate better methods of doing business. The *Ethyl* case [8] now before the Commission is an example of this activity as was the earlier *Boise Cascade* (Plywood) case.[9]

4. *"New Nonstatutory Offense Cases"* in which the FTC attacks market practices which Congress specifically chose to exempt from antitrust coverage. In the *Times-Mirror* case, for example, the Commission seeks to use Section 5 to extend the Robinson-Patman Act to services not covered by that statute.[10]

---

[4] See Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. Rev. 227, 228-38 (1980).

[5] See, e.g., *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939) (providing a very relaxed standard of proof for the conspiracy or combination element of Sherman § 1); *United States* v. *Container Corp.*, 393 U.S. 333 (1969) (agreement to price information invalidated under Sherman § 1 despite minimal anticompetitive effect).

[6] *Kellogg Company, et al.*, 3 CCH Trade Reg. Rep. ¶ 21,899 (FTC Docket 8883), complaint dismissed by Order dated January 15, 1982 with separate or dissenting statements by Commissioners Clanton, Pertschuk and Bailey.

[7] *Exxon Corp., et al.*, 3 CCH Trade Reg. Rep. ¶ 21,866, (FTC Docket 8934), complaint dismissed Sept. 16, 1981; See 3 CCH Trade Reg. Rep. ¶ 10,438 (reporting May 13, 1981 FTC press release that announced closing of 5-year, industrywide antitrust investigation of the automobile industry).

[8] *Ethyl Corp., et al.*, 3 CCH Trade Reg. Rep. ¶ 21,856 (FTC Docket 9128), appeal from Aug. 12, 1981 Initial Decision finding Section 5 violation now pending before full Commission.

[9] *Boise Cascade Corp.*, 91 F.T.C. 1 (1978), *rev'd sub nom. Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980).

[10] *Times Mirror Co.*, 3 CCH Trade Reg. Rep. ¶ 21,871 (FTC Docket 9103), consent order to cease and desist announced September 25, 1981 with Acting Chairman Clanton dissenting. *See Perpet-*

Continued

5. *"Competitive Balancing Cases"* in which the FTC attacks market practices in one industry because they may distort the FTC's model of competition in another. Thus, the FTC's order in RUEBEN H. DONNELLY (Airline Guide) attempted to restrict the discretion of the publisher to improve competitive balance in the airline industry. While that particular excess was overturned by the Second Circuit even under Section 5, the FTC continues to pursue similar theories in other proceedings.[11]

While this list is by no means exhaustive by category or case, it clearly illustrates the pressing need for leigslation to provide substantive content to the FTC's "unfair methods" jurisdiction.

Equally significant, the lack of objective standards governing the FTC's antitrust enforcement also serves to insulate the agency from effective judicial review. Without Congressional guidance in the FTC's organic statute, the courts have traditionally given the FTC great latitude in proscribing trade methods under the elusive "unfairness" rubric.[12] Confirming their review principally to substantical evidence and procedural fairness issues, the courts have thus been unable to curb effectively the FTC's attempts at activist regulatory intervention.

In sum, the premise upon which the 1914 Congress invested the FTC with its "unfair methods of competition" jurisdiction is no longer valid. The development and expansion of Sherman Act doctrine over the years has essentially eliminated the need for the FTC's elastic, catch-all "unfairness" mandate. At the same time, the lack of substantive content in the organic statute has allowed the FTC to engage in intrusive economic regulation at the whim of transient majorities and unchecked by meaningful judicial review.

B. The Effect of the Chamber's Proposed Legislation on FTC Antitrust Enforcement—

The Chamber's proposed amendment to Section 5(a) provides substantive content to the statutory prohibition of "unfair methods of competition" in two ways. First, it adopts the established body of judicial precedent developed under Sections 1 and 2 of the Sherman Act. And second, it incorporates all of the categories of practices that Congress may specifically define to be unfair.[13]

The proposed amendment thus returns the FTC to the mainstream of antitrust enforcement. Instead of being guided only by its own fluctuating perceptions of "fairness," the agency will have to exercise its "unfair methods of competition" authority in accordance with the dictates of Congress and/or established Sherman Act principles as developed by the courts.

At the same time, the Chamber's proposal will not frustrate any legitimate antitrust enforcement objectives that Congress believes the FTC should pursue. Thus, the amendment will have no impact on the FTC's separate statutory authority to enforce the Robinson-Patman Act and Sections 3, 7 and 8 of the Clayton Act. Further, the amendment expressly confirms and preserves the FTC's long-recognized power to proceed against all Sherman Act violations.[14]

What the proposed amendment does eliminate, however, is the potential for agency abuse that currently exists under the vague and otherwise contentless "unfair methods of competition" language. In particular, the amendment will prevent future FTC excesses based upon the so-called "incipiency," "spirit," and "*S&H* public values" theories.

---

ual Federal Savings & Loan Ass'n, 90 F.T.C. 608, 648 (1977), *order withdrawn*, 94 F.T.C. 401 (1979), in which the FTC attempted to use Section 5 to extend Clayton Section 8 and exercise jurisdiction over Bank-S&L director interlocks.

[11] *Reuben H. Donnelly Corp.*, 95 F.T.C. 1 (9180), *rev'd sub nom. Official Airline Guides* v. *FTC*, 630 F.2d 920 (2d Cir.), *cert. denied*, 101 S.Ct. 1362 (9181). *See Ford Motor Co.*, FTC Docket 9113, and *General Motors Corp.*, FTC Docket 9114, in which the FTC has attacked under Section 5 automobile manufacturer's business judgment in purchasing advertising in order to improve competition in rental and leasing industry.

[12] E.g., *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) (upholding FTC's authority to make ad hoc judgments of "fairness" concerning practices which violate neither the letter nor the spirit of the antitrust laws).

[13] Congress has already defined a number of acts and practices to be "unfair methods of competition" in the Wool Products Lebeling Act (15 U.S.C. § 68 et seq.), the Fur Products Labeling Act (15 U.S.C.. § 69 et seq.), and the Textile Fiber Product's Identification Act (15 U.S.C. § 70 et seq.). The Chamber's proposed amendment would carry forward such definitions without the need for further conforming changes.

[14] E.g., *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922) (Sherman Act is "declaration of public policy to be considered in determining what are unfair methods of competition"); *FTC* v. *Cement Institute*, 333 U.S. 683, 690 (1948) (expressly holding that FTC may condemn and suppress Sherman Act violations under FTC Act Section 5.)

Under the "incipiency" doctrine, the FTC claims the authority to stop acts and practices which, when full blown, would violate the Sherman and Clayton Acts.[15] How close to a completed violation a respondent must be before this incipiency theory can apply, however, is completely undefined. While such an approach may have made sense in 1914 when the reach of the Sherman Act was in doubt, today this doctrine provides the FTC carte blanche to attack legitimate, procompetitive business conduct based on mere speculation as to future developments. Current interpretations of Section 1 of the Sherman Act already provide a means to redress facilitating practices that might lead to trade restraints, while both the "conspiracy to monopolize" and "attempt to monopolize" provisions of Section 2 of the Sherman Act can be used effectively to halt anticompetitive behavior at an early stage. Accordingly, elimination of the open-ended "incipiency" theory under FTC Act Section 5 will reduce the potential for abuse that now exists without sacrificing any legitimate enforcement objective.

In the same manner, the so-called "spirit" application of Section 5 under which the FTC may "fill in the gaps" and prohibit conduct that violates the "spirit" of policy, but not the letter, of other antitrust laws is both largely unnecessary and subject to misuse. The Sherman Act, as it has evolved over the years, provides adequate authority to prevent unreasonable restraints of trade and fully empodies a policy of free and open competition. The undefined "spirit" doctrine permits the FTC to ignore specific statutory and/or judicially prescribed elements and, in effect, to create entirely new substantive offenses. If any "gaps" in fact exist which need to be "filled in," such a task is best left to the Congress.

Finally, the proposed amendment would effectively overrule the Supreme Court's suggestion in the *D&H* case [16] that the FTC can proscribe conduct as an "unfair method of competition" based solely on unarticulated and undefined "public values," even though such conduct poses "no threat to competition within the precepts of the antitrust laws" (405 U.S. at 244-45). Such overbroad delegation of discretionary authority, by its terms, has nothing to do with legitimate competition policy and smacks instead of centralized economic planning.

In summary, the Chamber's proposed amendment will not affect the FTC's traditional jurisdiction to enforce the Sherman, Clayton and Robinson-Patman Acts. It will, however, appropriately define the boundaries of such jurisdiction and preclude the FTC from regulating legitimate business conduct based solely on the agency's own peculiar "fairness" notions.

C. The FTC's Antitrust Enforcement Role Under the Chamber's Proposed Legislation—

The Chamber strongly supports soundly administered antitrust enforcement. Since its inception, the FTC has shared concurrent enforcement jurisdiction with the Department of Justice to redress Sherman Act and other antitrust violations. While this situation will continue under the Chamber's proposed legislation, the FTC's role in antitrust enforcement need not merely duplicate the Justice Department's efforts. Indeed, the Chamber's proposal will lay the foundation for a sensible long-term division of Sherman Act responsibilities between these two agencies.

Enforcement activity by the Antitrust Division tends to focus principally on "hard core," per se types of violations. Only the Justice Department can seek criminal sanctions under the Sherman Act and the Department has recognized a responsibility to devote a substantial portion of its resources to the pursuit of criminal anticompetitive conduct. The Department is thus somewhat constrained in undertaking litigation of the more complex, economically-oriented issues that can arise under a full-scale rule of reason analysis.

Under the Chamber's proposed amendment to Section 5, the FTC's enforcement efforts can appropriately complement the Justice Department's activities and be channeled toward areas where the agency's expert economic resources will be most profitably utilized. The FTC will be able to undertake a detailed reexamination of the economic underpinnings of various antitrust theories and help rationalize this area of the law. Similarly, the FTC can bring enforcement actions under established

---

[15] Such "incipiency" authority has been recognized by the Supreme Court. *E.g., FTC* v. *Cement Institute*, 333 U.S. 683, 693 (1948); *FTC* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394-95 (1953). In doing so, however, the Court indicated that it was executing the clear legislative intent of the 1914 Congress. See, e.g., MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 Geo. Wash. L. Rev. 407, 414-15 (1973). In 1914, of course, there was a perception that the Sherman Act's proscription of monopoly and trade restraints was in danger of being judicially weakened—a perception that subsequent developments have proved to be unfounded.

[16] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

Sherman Act standards to test the competitive effects of new business practices and conduct as they emerge. In such cases, where the practice at issue is either completely new or perhaps previously untested, the cease and desist remedies available to the FTC, which operate only prospectively, are particularly appropriate.[17]

The Chamber's proposal also provides inherent flexibility that will allow the FTC and Congress to work together to ensure that national antitrust objectives are fully realized. To this end, the proposed amendment contemplates that Congress, based on the recommendations and analyses of the FTC, can statutorily define any new category of conduct to be an "unfair method of competition." In such cases, however, it will be the considered judgment of elected representatives that controls, rather than the political and social preferences of a majority of unelected Commissioners.

III. CLARIFICATION OF THE FTC'S "UNFAIR OR DECEPTIVE ACTS OR PRACTICES" AUTHORITY

The second significant feature of the Chamber's legislative proposal concerns the FTC's exercise of its Section 5 "unfair or deceptive acts or practices" authority. In this connection, the Chamber carefully considered several alternative formulations that attempted to define prohibited acts and practices by specific category and type. However, as Congress itself concluded when it enacted the Wheeler-Lea amendments to the FTC Act, such an approach would be unworkable from any practical standpoint. As in the case of "unfair methods," the Chamber's proposed revision of the "acts and practices" language attempts to provide overall direction to the FTC and to define the limits of intervention in consumer protection matters.[18]

Under the current statutory formulation, the FTC's consumer protection jurisdiction extends to acts or practices that are "unfair or deceptive." Since this language was added to Section 5 in 1938, the Commission has made great strides in eliminating from the marketplace conduct that is "deceptive" in the traditional common law sense. Its premise has been that the free flow of accurate consumer information is essential to the competitive process and necessary for the efficient operation of markets—a premise that few would dispute. There is no arguing with the proposition, for example, that intentional or reckless misrepresentation of a product characteristic should be enjoined.

More recently, however, the FTC has gone significantly beyond traditional concepts of deception, all of which involve some element of improper motive or intent, in invoking its Section 5 "acts or practices" jurisdiction. The Commission has asserted authority under the "unfair or deceptive" rubric to reach conduct which, regardless of intent or motive, is merely alleged to have an adverse impact on consumers. In moving away from traditional deception to more subtle questions of consumer injury, the Commission is once again left without meaningful standards to guide its actions. All too often, the agency has used subjective perceptions of consumer impact as an excuse to embark upon experiments in social activism.

One recent example of the problems that can arise from the Commission's elastic application of its "unfair or deceptive" authority is the discredited, although technically still pending, product standards trade regulation rule.[19] The origins of this proceeding lie in legislation introduced in both the 94th and 95th Congresses by Senator Abourezk calling for federal regulation of the nation's product standards system. Although lengthy Senate hearings were held, the legislation remained

---

[17] As the Commission itself recently observed, an agency "equipped with economic expertise" and "whose authority is limited to the issuance of prospective, nonpunitive orders to cease and desist" is especially able to adjudicate "sensitive issues" that may arise in more esoteric aspects of antitrust enforcement. Letter of Comm., per Chairman Miller, to Senators Packwood and Kasten dated Mar. 5, 1982 at p. 5.

[18] The first minimal step with respect to the FTC's "unfair acts or practices" authority, of course, has been discussed earlier and concerns proposed legislation to make permanent the temporary provisions of Section 11(b) of the 1980 Improvements Act which prohibit the FTC from initiating new Magnuson-Moss rulemaking to regulate commercial advertising as an "unfair act or practice." Given the significant First Amendment considerations that exist in this area, "unfairness" is simply too vague a concept to be used in regulating advertising.

[19] The FTC announced its proposed trade regulation rule concerning standards and certification on Dec. 7, 1978 (43 Fed. Reg. 57269). The new rule was to have become Part 457 of 16 CFR and would have made it both an "unfair method of competition" and "an unfair or deceptive act or practice" for any standards developer, certifier or marketer to violate its provisions. At the urging of the U.S. Chamber and other responsible business representatives, Congress enacted Section 7 of the FTC Improvements Act of 1980 prohibiting the Commission from promulgating a trade regulation rule concerning standards or certification activity under its Magnuson-Moss authority. Nonetheless, the Commission has kept the standards rulemaking alive under a different statutory provision of the FTC Act. See BNA Antitrust & Trade Reg. Rep., No. 987 at A-19 (Oct. 30, 1980).

stalled in Subcommittee, while a similar bill in the House did not even muster hearings. Despite this demonstrated absence of Congressional interest, the FTC took it upon itself to attempt to impose almost identical regulation of the standards process by a trade regulation rule.

The key issue raised by the standards proceeding is that our elected representatives, when presented with the opportunity, chose not to create laws in the area of voluntary standards setting. Nonetheless, the unelected FTC, insulated from responsibility to voters, has been trying to use its "unfairness" authority and the administrative process to accomplish the very same end.

Another controversial exampie of the FTC's expansive use of its "unfair or deceptive acts or practices" jurisdiction is the infamous children's advertising proceeding.[20] The Staff Report that recommended prohibition of televised advertising to young children offered three "justifications" for condemning such advertising as "unfair or deceptive," i.e., (1) "the striking imbalance of sophistication and power" between advertisers and children; (2) the "manipulative—as opposed to informative—nature of the advertising"; and (3) the "unfairness of putting parents to a choice * * * between purchasing products advertised to children on television and enduring the conflict that goes with a refusal to buy the products." The first two of these "justifications," however, would apply to almost any advertising as the advertiser always possesses more "sophistication and power" than the average consumer and always hopes that his commercial message will "manipulate" the consumer, if that means inducing the consumer to make a purchase. As for the third "justification," the FTC's intrusion into parental supervision of children aptly earned the agency its pejorative nickname of "National Nanny."[21]

A third example of misguided "acts or practices" rulemaking is the FTC's proceeding against vocational schools.[22] This industry, which is composed of many honest small businessmen, had been criticized because of the sharp practices of a small number of school operators. Despite concerted efforts by both industry associations and state authorities to eliminate such abuse, the FTC nonetheless initiated a broad rulemaking designed to change the basic economics and business methods of the entire industry. In so doing, the Commission gave no consideration to the impact of its proposed action either on the many non-offending small businessmen or on the students themselves who, under the FTC's proposal, would have had to bear substantially increased tuition costs.[23] Had an appropriate cost-benefit analysis been undertaken, the vocational schools rulemaking would undoubtedly have had a significantly narrower and more appropriate focus.

The Commission itself has recognized the problems inherent in its undefined "unfair of deceptive acts or practices" authority when used outside the area of traditional deception and has, on several occasions, issued policy statements attempting to clarify the issue.[24] In December of 1980, for example, the Commission submitted to the Consumer Subcommittee a lengthy "Statement of Policy" concerning the scope of its consumer unfairness jurisdiction.[25] The Commission exoressly reaffirmed that Policy Statement in its most recent March 5, 1982 letter to this Commit-

---

[20] The FTC published a formal announcement on Apr. 27, 1978 initiating a trade regulation rule proceeding to deal comprehensively with the entire area of television advertising to children (43 Fed. Reg. 17967). The Congress quite properly terminated this exercise as inappropriate social engineering when it adopted Section 11 of the 1980 Improvements Act prohibiting promulgation of any rule with respect to such advertising under the Commission's "unfair acts or practices" jurisdiction.

[21] Another example of the FTC's overzealous efforts to regulate the field of commercial advertising under its expansion notions of "unfairness" and "deception" is the "Proposed Rule Concerning Advertising for Over-the-Counter Drugs," announced Nov. 11, 1975 (40 Fed. Reg. 52631). Under this proposal, all advertising for OTC drug products would have been limited strictly to labeling language approved by FDA, thus turning television commercials for such products into a dry recitation of ingredients, warnings, etc. The Commission properly terminated this unwise effort, after several years of costly proceedings, on May 1, 1981 (46 Fed. Reg. 24584).

[22] The FTC issued its "Proprietary Vocational and Home Study Schools" trade regulation rule as Part 438 of 16 CFR on Dec. 28, 1979 (44 Fed. Reg. 32207). The rule, however, was subsequently overturned by the court of appeals in *Katherine Gibbs School* v. *FTC*, 612 F.2d 658 (2d Cir. 1980).

[23] See Ellis, *Legislative Powers: FTC Rulemaking in The Federal Trade Commission Since 1970* at 177 (Clarkson & Muris ed. 1981).

[24] See, e.g., Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[25] Letter of Commission, per Carol M. Thomas, Secretary, to Sen. Wendell H. Ford and Sen. John C. Danforth dated Dec. 17, 1980.

tee and has further suggested that formal codification of the principles articulated in the Statement would be appropriate at this time.[26]

In both its March 5 letter and the December 1980 Policy Statement, the Commission identified the concept of "consumer injury" as the primary focus of the agency's authority to prohibit non-deceptive trade practices on "unfairness" grounds. At the same time, the Commission acknowledged that the consumer injury criterion does not mean that every consumer injury is legally "unfair." Rather, to justify a finding of unfairness, the injury must also satisfy the following three tests:

1. The anticipated injury must be substantial and involve economic or monetary harm, rather than subjective harms such as emotional distress or offenses to taste or social belief;

2. The injury must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and

3. It must be an injury that consumers themselves could not reasonably have avoided.

The U.S. Chamber's legislative proposal simply takes the Commission at its word and defines unfair or deceptive acts or practices under Section 5 to be those which: "directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition. * * *"

The Chamber's proposal would not impair the FTC's current authority to condemn and prevent actual "deception." Falsehoods and intentionally misleading representations have no proper place in a well-functioning free market. By its very nature, such fraudulent behavior is intended to inflict and does inflict substantial injury on consumers. Because such conduct has no redeeming virtue and cannot be reasonably avoided, FTC enforcement action against acts and practices that have been traditionally recognized as "deceptive" can, under the Chamber's proposed legislation, continue as in the past.

With respect to the more elusive category of acts and practices which are alleged to be "unfair or deceptive" based solely on claims of adverse consumer impact, however, the Chamber's proposed amendment codifies the FTC's most recent pronouncements that "substantial" injury is an essential element of such a violation. It insures that the FTC's limited enforcement resources will be spent on matters of real economic significance, and not wasted on non-existent, trivial or merely speculative harms.

The Chamber's proposal also incorporates the concepts of "reasonable avoidability," as well as a basic cost-benefit analysis, as part of the broader assessment of consumer impact. Each of these factors was expressly identified by the Commission in its most recent letter to this Committee as an appropriate predicate to the exercise of its "acts or practices" authority over "unfair" conduct.[27] By incorporating these elements in the organic statute along with the fundamental "substantial injury" test, both the public and reviewing courts can be sure that the key criteria articulated by the Commission will be given the force of law and cannot be ignored by the agency in the future.

IV. ELIMINATION OF OVERLAPPING REGULATORY JURISDICTION

The third and final element of the Chamber's proposed legislation deals with the FTC's increasingly vexations use of its Section 5 "acts or practices" authority as a backstop for the perceived deficient performance of other agencies or, in some cases, even of Congress. Rather than focusing its energies on the commercial sales and marketing issues which are its special province, the FTC has attempted to extend its consumer protection jurisdiction to issues such as product design, safety and environmental effect which generally fall within the appropriate competence of other specialized regulatory bodies. In other instances, even though Congress may have determined not to act with respect to a particular area, the FTC has been all too willing to intervene and impose its own regulation under color of the Section 5 "acts or practices" authority.

---

[26] Letter of Commission, per Chairman Miller, to Senators Packwood and Kasten dated Mar. 5, 1982.

[27] While the Commission's Mar. 5 letter suggests that a highly quantitative cost-benefit analysis may not be appropriate in every case, the analysis should at least "take into account costs related to a prospective remedy, including but not limited to direct cost to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and like matters." (Id. at p. 8.)

In certain respects the children's advertising proceeding contained a strong undercurrent of this sort of Commission attitude. To the extent the proceeding focused on sugared food products, the attack was motivated not so much by any concerning for deceptive or misleading advertising, but rather by the unarticulated notion that sugared foods are simply bad for children. Because even the Commission recognized that it had no power to banish such products from the grocery shelf by administrative fiat, it nonetheless tried to do the next best thing by prohibiting manufacturers from advertising the products' existence. While the FTC may properly control abusive marketing practices, it should not be in the business of determining whether a product is fundamentally good or bad and thereby usurp consumer choice.

Similarly, the Commission has initiated a number of proceedings which, although technically cast in terms of advertising and marketing practices, actually turn on issues of basic product design. Thus, the agency is currently engaged in litigating the safety of tractor gas tanks[28] and has recently obtained a consent order that requires warning stickers on new jeep vehicles advising of potential handling and driver control problems.[29]

In other instances, the FTC has stepped in despite Congress' judgment that a particular type of regulation is either unwise or unnecessary. In the Fair Debt Collection Practices Act (15 U.S.C. §§1682 et seq.), for example, Congress expressly exempted attorneys and certain retailers from coverage of the statute. Despite this explicit statement of Congressional intent, the FTC has used its Section 5 "acts or practices" authority to extract consent orders from exempted individuals and businesses which essentially duplicate the statutory requirements. Such overreaching by the Commission is particularly inappropriate in this case, where Congress has already provided a mechanism in the statute for yearly reports and recommendations from the agency to permit legislative modification when and if necessary. Under Section 5, however, the Commission was able to short-circuit this process and effectively "legislate" its own ad hoc repeal of the statutory exemptions.

The Chamber believes that Congress never intended to make the Commission an all purpose consumer protection agency. Congress has established specialized regulatory bodies with appropriate competence, such as the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency, to deal with complex product design, safety and environmental problems. Therefore, it is inappropriate for the Commission, acting in the name of consumer protection, to invade areas which Congress has determined either to exempt or else to commit to the specific jurisdiction of one of the more specialized regulatory authorities.

The Chamber's proposed legislation would help to alleviate this problem by prohibiting FTC exercise of its Section 5 "acts or practices" powers with respect to conduct that is authorized by federal statute or subject to the direct regulatory authority of another federal agency. In this way, the proposal would eliminate possible jurisdictional conflicts and prevent Commission interference in matters best left to the expertise of Congressionally-established specialized agencies. Perhaps most important, it would also give the Commission clear direction to focus its energies on traditional marketing issues, rather than try to play the role of universal consumer protector.

V. REPEAL OF SECTION 5(m)(1)(B)

Finally, in addition to its affirmative legislative proposals, the U.S. Chamber also urges that Section 5(m)(1)(B) of the Federal Trade Commission Act be repealed.

Under Section 5(m)(1)(B), the FTC is able to seek civil penalties of up to $10,000 per violation from companies for violating final cease and desist orders entered in proceedings against other firms. Section 5(m)(1)(B) does not require that the company from which the FTC is seeking penalties was actually a party to, or had prior notice of and an opportunity to be heard in, the original cease and desist proceeding. Instead, all that is required is that the charged company (1) engage in an act or practice after a cease and desist order with respect to such act or practice has become final and (2) have "actual knowledge" by virtue of that cease and desist order that the act or practice in question has been found "unlawful." In effect, Section 5(m)(1)(B) turns cease and desist orders into general rules without even the

---

[28] *International Harvester*, FTC Docket 9147, concerning "fuel geysering" problem of farm tractors.

[29] *American Motors Corp.*, 3 CCH Trade Reg. Rep. ¶21,890, consent order to cease and desist announced Nov. 10, 1981.

minimal due process protections applicable to agency rulemaking under the Administrative Procedure Act.

When originally enacted in 1975, Section 5(m)(1)(B) was intended to enable the FTC, after it had fully and fairly litigated the lawfulness of particular act or practice against one respondent, to move quickly and effectively against other firms using the same practice in the same or similar circumstances. Experience with the FTC's exercise of its new Section 5(m)(1)(B) authority since that time clearly demonstrates that, however reasonable that intent of Congress may have been, the procedure is inherently unfair and subject to manipulation and abuse.

Thus, rather than employ its Section 5(m)(1)(B) powers as a means of follow-up enforcement to properly litigated proceedings, the FTC has undertaken a program of wholesale mailings of both old and new orders, including many of an extremely general nature and application. It has done so despite the plain prospective wording of the statutory language which contemplates that only Commission determinations made after January 1975 are to be used as a basis for bringing a penalty action.[30] By this device, the agency is in a position to eschew conventional proceedings and to claim, on the basis of ancient orders, penalties of $10,000 per violation against companies on its mailing list.

The FTC's 1978 "down products" mailing illustrates how Section 5(m)(1)(B) has been misused. In that case, the Commission sent out to 250 industry members a "notice package" containing orders dealing with the labeling of down products made between 1942 and 1957—although an important Seventh Circuit reversal of a highly relevant Commission decision in this area was omitted. In addition, the Commission's Staff Enforcement Policy Statement, which was included in the notice package, declared that failure to comply with the Commission's *1971 Down Products Guides* would be deemed to be a violation of the 1942-1957 orders despite the fact that: (1) the labeling standards contained in the 1971 *Guides* were substantially different from those in the 1942-1957 determinations; (2) no cases had been brought since the 1971 *Guides* were adopted; and (3) the FTC had previously stated that the *Guides* have no force of law or precedential value, are only advisory in nature and merely represent the Commission's opinion as to what might be an unfair or deceptive practice. Clearly, this sort of informal rulemaking by the Commission's staff, without hearings or other procedural safeguards, was never intended under Section 5(m)(1)(B).

Furthermore, the Section 5(m)(1)(B) authority also creates a distinct potential for manipulation of the administrative process even when an actual cease and desist hearing is held. For example, the FTC can select as a respondent the firm which, for financial or other reasons, is least able to mount an effective defense. Thereafter, the agency can seek to use any final cease and desist order entered against such a respondent, whether or not tested on judicial review, as a conclusive determination of the legality of the practice in civil penalty proceedings against other companies.[31] Indeed, although the FTC asserts that it will only use its Section 5(m)(1)(B) authority with respect to litigated cease and desist cases, there is nothing in the statute itself which would prevent the bringing of a civil penalties proceeding based on a negotiated consent order.

The only judicial authority interpreting Section 5(m)(1)(B), an interlocutory district court decision,[32] has created a great deal of confusion. Acknowledging the obvious due process problems inherent in this provision, the district court held that a civil penalties defendant was certainly entitled to litigate both whether it had "actual knowledge" of the "unlawfulness" of its conduct and whether its conduct was different from that proscribed in the earlier order. In addition, the court further suggested that, "in an appropriate case," a defendant might defend on grounds of lapse of time and changed conditions, or perhaps even attack the legal sufficiency under Section 5 of the FTC's prior determination. Thus, the court's decision has created substantial uncertainty as to exactly what is open for litigation in a Section 5(m)(1)(B) penalty proceeding.

---

[30] Section 5(m)(1)(B) provides in pertinent part: "If the Commission *determines* in a proceeding under subsection (b) * * * and *issues* a final cease and desist order with respect to such act or practice, the Commission may commence a civil action to obtain a civil penalty in a district court * * *" Under the plain meaning of the underscored words in the present tense, Congress intended that the provision be applied prospectively only, i.e., on the basis of legal principles established in determination (final orders) made after the Jan. 4, 1975 effective date of the statute.

[31] Under Section 5(m)(2), only "issues of fact" are open for litigation in the civil penalties action by a defendant which was not specifically named in the original cease and desist order.

[32] *United States* v. *Braswell, Inc.*, 1981-2 Trade Cases ¶ 64,325 (N.D. Ga. 1981).

The fundamental defect of Section 5(b)(1)(B) is its failure to safeguard one's right not to be held liable for civil penalties without a reasonable opportunity to establish the legality of one's conduct. Because there is no requirement in the statute for prior notice and an opportunity to be heard, the FTC can demand enormous monetary penalties on the basis of old orders or, alternatively, by picking on the weakest target and extending a resulting cease and desist order industrywide. Basic fairness and due process require that the FTC be prepared to litigate the legality issue fully and fairly against all industry members that may be affected before civil penalties can be imposed.

In addition, Section 5(b)(1)(B) suffers from vague and ambiguous drafting. Although the entire provision is premised upon the existence of a final cease and desist order, a defendant may be held liable for civil penalties based upon "actual knowledge that [an] act or practice is unfair or deceptive," irrespective of actual knowledge of the prior order. Similarly, because statutory liability arises merely from a "final" order, rather than one entered after hearing and decision, there is a danger that Section 5(b)(1)(B) civil penalties could be sought on the basis of a negotiated consent order without any adversarial testing of legality.

All of these problems are further compounded by the possibility that $10,000 penalties may be imposed for "*each* violation" (emphasis added). What constitutes an individual violation, however, is nowhere defined, nor is any maximum number of possible violations resulting from a single transaction specified. As recent cases demonstrate, one bulk mailing or the circulation of single publication may result in millions of separate violations and potential civil penalties measured in billions of dollars.[33]

For all these reasons, the U.S. Chamber believes that the only sensible solution to the Section 5(m)(1)(B) problem is repeal of the provision in toto.

CONCLUSION

The Chamber appreciates the opportunity to bring the views of its members to the Subcommittee's attention. We are confident that these important issues will be debated fully and fairly, and we hope that the concepts incorporated in our proposals will provide a basis for constructive legislative supervision of the Commission's future activities.

APPENDIX

Draft Legislation To Clarify FTC's Power To Prevent "Unfair Methods of Competition" And "Unfair Or Deceptive Acts Or Practices"

I. Amend Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)) to read as follows:

"(1)(A) Unfair methods of competition in or affecting commerce are declared unlawful: *Provided, however,* That no method of competition shall be deemed to be unfair unless it—

"(i) violates sections 1 or 2 of the Sherman Act; or

"(ii) is expressly defined to be an unfair method of competition by Federal statute.

"(B) Unfair or deceptive acts or practices in or affecting commerce, where such acts or practices directly cause or may foreseeably result in substantial economic injury to consumers and such injury is neither reasonably avoidable by consumers themselves nor outweighed by countervailing benefits to consumers or competition, are declared unlawful."

II. Amend Section 5(a) of the Federal Trade Commission Act (15 U.S.C. § 45(a)) by adding a new paragraph (3) which reads:

"(3) Nothing in subparagraph (1)(B) of this subsection shall apply to any act or practice which is authorized by Federal statute or subject to the direct regulatory authority of another Federal agency."

III. Repeal Section 5(m)(1)(B) of the Federal Trade Commission Act (15 U.S.C. § 45(m)(1)(B)).

Senator KASTEN. Our next panel includes Dr. Boyle, Mr. Dougherty, Mr. Bomba, Ms. Cole, Mr. Fogleman, and Mr. Angoff.

---

[33] *E.G., United States* v. *Golden Fifty Pharmaceutial Co., Inc.*, 421 F. Supp. 1199 (N.D. Ill. 1976) (ruling that government could have charged 25 million violations, one for each copy of a comic book containing an offending advertisement); *United States* v. *Reader's Digest Ass'n, Inc.*, 662 F. 2d 955 (3d Cir. 1981), *cert. denied*, 50 L.W. 3570 (1982) (bulk mailing of 16 million copies of an advertisement constituted as many separate violations).

[Pause.]

Senator KASTEN. The committee will come to order. What we will do is receive testimony from the entire panel and ask that you summarize your statements and limit your testimony to less than 5 minutes each. As you know, your entire testimony will be made part of the record, and then you will respond to questions as a panel.

Our first testimony will be received from Dr. Joseph Boyle, who is the president of the American Medical Association.

Dr. Boyle.

STATEMENTS OF JOSEPH F. BOYLE, M.D., PRESIDENT, AMERICAN MEDICAL ASSOCIATION; J. CHRYS DOUGHERTY, MEMBER, HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY BETTY JANE ANDERSON, ASSOCIATE GENERAL COUNSEL; JOHN BOMBA, PRESIDENT, AMERICAN DENTAL ASSOCIATION; EUNICE COLE, PRESIDENT, AMERICAN NURSES ASSOCIATION, ACCOMPANIED BY THOMAS NICHOLS, LEGISLATIVE DIRECTOR AND COUNSEL; STEPHEN C. FOGLEMAN, COUNSEL, NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS; AND JAY ANGOFF, STAFF ATTORNEY, PUBLIC CITIZEN/CONGRESS WATCH

Dr. BOYLE. Thank you very much, Mr. Chairman. I am Joseph Boyle. I am a physician in practice in internal medicine in Los Angeles. I am president of the American Medical Association, and with me today is Betty Jane Anderson, who is associate general counsel for the American Medical Association.

We have given you our testimony and I will summarize very briefly what we have here so we will conserve your time.

We have a broad range of interests, as you know. Among those are, in our profession, upholding standards of professional conduct by members of our profession; the elimination of practices that are not beneficial or potentially harmful to the public, regardless of whether they are performed by physicians or by others.

We are also concerned about activities to lower the cost of medical care. We believe that these are in the public interest and should be encouraged.

The activities of not-for-profit associations also include establishing voluntary standards for certification of competence; accreditation of medical and other professional schools; graduate and continuing education; efforts to make quality care available to those who are in need; and setting standards to protect the public from deception and incompetence.

We recognize that competition is a benefit to society and have supported this. We have described in previous testimony how the AMA and other medical associations have, in recent past, been discouraged from pursuing many activities that they viewed to be in the public interest, and some of the potential interventions of the Federal Trade Commission.

The investigations and proposed rules in the past have sometimes shown a lack of understanding and concern for both State regulation of professions and appropriate self-regulation by the professions to protect the public interest.

As a consequence, many of our associations have begun or have eliminated activities that they believe were designed to protect the public rather than face protracted and expensive legal action.

In the last 2 years since our appearance before this committee, there have been two developments. First, we have had an opportunity to discuss with the FTC some of the unique attributes of our profession. There has been increased sophistication by the FTC in recognizing benefits that have accrued from self-regulation, and our discussions continue with the FTC.

This dialog can promote competition, while avoiding needless cost of investigation and administrative activities, and can help to remove some of the chilling effect that there has been on some of our associations.

Second, recent Supreme Court decisions, including the Southern Motor Carriers case, have clarified the antitrust consequences of private actions authorized by the States. Such cases provide important guidance concerning the application of the antitrust laws to activities that are promoted and supervised by State government.

Because of these developments, the AMA believes that it is not necessary to adopt specific language concerning the professions as a part of the FTC reauthorization legislation.

On the contrary, we feel that in today's climate, such language could be counterproductive as establishing rigid limits in a period of mutual discussions and evolving law. We continue to support other modifications to the act that have been previously proposed.

It is time, Mr. Chairman, to adopt legislation to reauthorize the Federal Trade Commission. We are pleased that the courts continue to recognize the importance of State regulation in areas necessary for the protection of the public.

And at this time, we do not believe that special language concerning the professions is needed. We support reauthorization for the Federal Trade Commission with the other amendments as we have indicated in our formal testimony.

Senator KASTEN. Doctor, thank you very much.

Next, Mr. Dougherty, who is a member of the American Bar Association.

Mr. DOUGHERTY. Mr. Chairman, my name is J. Chrys Dougherty. I am a practicing lawyer in Austin, TX and I currently serve as a member of the American Bar Association's House of Delegates, the policymaking body of the association.

I appear at the request of John C. Shepherd, president of the ABA, to present the views of the association concerning the reauthorization of the Federal Trade Commission, which we generally support.

I speak specifically on the FTC's activity with regard to State-regulated professions. The ABA does not support the professions "compromise" proposed in the last Congress, and recommends that these provisions not be included in any FTC reauthorization legislation considered this year.

We are convinced that the law, as it is, affords the most salutary way to protect the integrity of the State supreme courts' control of professional practices.

In the last Congress, both the House and Senate Commerce Committees approved reauthorization legislation incorporating a com-

promise proposal which would have prevented the FTC from using its unfair and deceptive acts or practices authority to overturn State laws establishing the educational or licensing requirements of professionals and their permissible tasks or duties.

The ABA opposed this proposal as drafted and, as a defensive matter, sought to amend it to preserve traditional and effective State regulation of the legal profession from improvident FTC preemption.

By specifying only education, licensure, and tasks or duties as specifically excepted areas of State regulatory activities, we believe that proposed new section 24 of the Federal Trade Commission Act could, by necessary implication, empower the Commission with authority that it does not now clearly posssess to regulate all other activities of lawyers, activities which by custom and practice long antecedent to the passage of the Federal Trade Commission Act, have been considered the legitimate and exclusive function of the State court systems.

Less than a month ago, the Supreme Court decided two extremely significant cases, clarifying and widening the application of the state action doctrine. They are *Town of Hallie* v. *the City of Eau Claire* (No. 82-1832) and *Southern Motor Carriers Rate Conference* v. *the United States.* (No. 82-1922).

In brief, these cases make clear that State action need not be evidenced by explicit statutory language stating that the conduct in question is expected to have anticompetitive effects and also need not be evidenced by statutory compulsion. This is important in the context of the legal profession because when a State supreme court exercises a "broad authority to regulate", as in the establishment of standards of practice for a professional, certain anticompetitive effects may result.

It was this broad authority to regulate activities of the bar by the courts that we found it necessary to protect when language in the bill sought a specific protection of only certain limited activities of a profession, thereby implying that all other activities within the court's broad authority might be subject to FTC control.

In the last Congress, FTC reauthorization bills under consideration made the State action doctrine applicable to the FTC's antitrust authority. In our view there is little question that the State action exemption, since it is based on concepts of federalism, applies to the Federal Trade Commission's exercise of its antitrust authority under its mandate to prevent "unfair methods of competition."

We believe that the rationale of the Supreme Court decision in *Parker* v. *Brown* and the logic of *Town of Hallie* and *Southern Motor Carriers* apply equally to FTC's consumer protection jurisdiction. As with the Sherman Act, the legislative history of the Federal Trade Commission Act provides no indication that Congress intended to make State action subject to the act.

The legislative history of the 1938 Wheeler Lee amendments to the FTC Act which gave the Agency its authority to prohibit "unfair and deceptive acts or practices" reveals no report language or colloquy in either the House or the Senate suggesting an intention to apply the statute to State action.

Similarly, the statutorial language of the 1975 Magnuson-Moss Act makes no reference to the impact of FTC's consumer protection rules on State law.

Thus, nothing in the legislative history of the FTC Act or of any of its amendments supports the notion that any part of the act applies to State action as that term has been defined by the Supreme Court. Moreover, in a time of shrinking Federal budgets and new additional overlay of FTC regulation in areas already effectively regulated by the States would be unnecessary and unwise.

I would be happy to answer any questions that you or members of the subcommittee desire to ask.

[The statement follows:]

STATEMENT OF J. CHRYS DOUGHERTY ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is J. Chrys Dougherty. I am a practicing lawyer from Austin, Texas and a former president of the State Bar of Texas. I currently serve as a member of the American Bar Association House of Delegates, the policy-making body of the ABA.

I am pleased to appear before you this morning at the request of John C. Shepherd, President of the ABA, to present the views of the Association concerning the reauthorization of the Federal Trade Commission. My remarks will focus primarily on the FTC's activities relating to state-regulated professions. The ABA does not support the professions "compromise" proposed in the last Congress and recommends that these provisions not be included in any FTC reauthorization legislation considered this year.

The American Bar Association is made up of individual lawyers—now over 300,000—who are all volunteer members. Although state bars, through elected representatives, participate in the governance of the ABA House of Delegates, state bar associations, as organizations, are not in any way a part of or controllied by the American Bar Association.

The ABA has had a history of good relationships with the FTC itself. In 1969, the ABA financed and carried out a detailed and lengthy study of the FTC, seeking ways to make it more responsive to the public need, more effective in its management and better able to carry out the intent of Congress. This ABA report is generally credited with stimulating subsequent congressional action reinvigorating the Commission.

In the late 1970's, however, the ABA and many state bars were critical of an unfocused FTC investigation of the delivery of legal services, believing that the regulation of the legal profession is an important responsibility of the states. Nevertheless, the Association has continued to work congenially with the Commission on matters of mutual interest and concern.

As you are well aware, the matter off the precise terms of proposed reauthorization of the Federal Trade Commission has been before the Congress for several years. One of the key controversies has centered around the efforts of the FTC to assert its jurisdiction over the professions, including the legal profession, despite the fact that the legal profession is already fully and effectively regulated by the supreme courts of the states.

In the 97th Congress, the House of Representatives passed, and the Senate Commerce, Science and Transportation Committee approved, legislation clarifying that the FTC has no jurisdication over state-regulated professions. This legislation was not enacted.

In the last Congress, both the House and Senate Commerce Committees approved reauthorization legislation incorporating a compromise proposal which would have prevented the FTC from using its "unfair or deceptive acts or practices" authority to overturn state laws establishing (1) the educational or licensing requirements of professionals and (2) their permissible tasks or duties. This has been known as the professions compromise.

The American Bar Association, the Conference of (state) Chief Justices and many state and local bar associations opposed this proposal as drafted and sought to amend it to preserve traditional and effective state regulation of the legal profession from improvident FTC preeemption. By specifying only education, licensure and tasks or duties as specifically excepted areas of state regulatory activity, we believed that proposed new Section 25 of the Federal Trade Commission Act could, by neces-

sary implication, empower the Commission with authority it does not now clearly possess to regulate all other activities of lawyers—activities which by custom and practice long antecedent to passage of the Federal Trade Commisson act have been commonly considered the legitimate and exclusive function of the state court systems.

The development of the doctrine of inherent judicial power to regulate the practice of law is rooted in the English common law. From this evolution of the common law has emerged an extensive system of regulation of lawyers, including admission requirements, ethical codes and disciplinary rules which govern virtually every aspect of a lawyer's professional life. These rules are ordinarily made mandatory by orders of the supreme court of a particular state.

An unbroken line of U.S. Supreme Court authorty supports the principle of the inherent power of the states to regulate the practice of law. Indeed, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 362 (1977), the Court said:

"(T)he regulation of activities of the bar is at the core of the State's power to protect the public. Indeed, this court in *Goldfarb* acknowledged that '(t)he interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts."' "

This principle was most recenty reaffirmed in *Hoover* v. *Ronwin*, 466 U.S. , 104 S. Ct. 1989 (1984), in which the Court held that the state action doctrine precluded a suit under the Sherman Act against a committee of the Arizona Supreme Court charged with developing and grading bar examinations.

It was not the intent of Congress in passing the Federal Trade Commission Act to trench the state's judicial authority to regulate the activities of the bar. As was said in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975):

"[I]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the profession antitrust concepts which originated in other areas. The public service aspect and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." [421 U.S. at 788 n. 17]

This view was fortified by *Bates*, which held that though certain advertising is protected by the First Amendment, a prohibition against lawyer advertising does not violate the Sherman Act. There the Court held:

"The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings."

Therefore, even in 1981 we thought it was unnecessary, in order to protect the right of the states to control their bars, to seek an exemption from FTC regulation by amendment of the Federal Trade Commission Act, and the ABA did not join in that attempt in the 97th Congress. We are even more convinced now that the law, as it is, affords the most salubrious way to protect the integrity of the state courts' control of professional practices.

Less than a month ago the Supreme Court decided two extremely significant cases, clarifying and widening the application of the state action doctine. They are *Town of Hallie* v. *City of Eau Claire* (No. 82-1832) and *Southern Motor Carriers Rate Conference* v. *U.S.* (No. 82-1922).

Town of Hallie v. *City of Eau Claire* deals with a governmental body, the respondent *City of Eau Claire*, which acted under Wisconsin statutes regulating the supplying of sewage services by municipalities and authorizing review by the State's Department of Natural Resources of the municipality's conduct in so supplying services.

First, the Court considered *Parker* v. *Brown*, stating as follows:

"The starting point in any analysis involving the state action doctrine is the reasoning of *Parker* v. *Brown*. In *Parker*, relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature. . . . Rather, it ruled that the Sherman Act was intended to prohibit private restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature."

The Court then points out that to be beyond the reach of the antitrust laws municipalities "must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " (Citing *Partker* v. *Brown*, 317 U.S. at 413.)

The important impact of this case on the question of regulation of the state judiciary's regulation of the bar is that a clear state mandate, antipathetical to the mandate of the Sherman Act against monopolistic activity, is not required. The Court said: "* * * It is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. * * * it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate."

When the state supreme court exercises a "broad authority to regulate" (as in the establishment of ethical standards for a professional) certain "anticompetitive effects" may result.

It was this "broad authority to regulate" activities of the bar by the courts that we found it necessary to protect when language in the bill sought a specific protection of only certain limited activities of a profession, thereby implying that other activities within the courts' broad authority to control, even though effectively controlled, would be subject to FTC control.

Such FTC control would have been in conflict with the traditional control by the state court of its bar under existing law.

For example, an integrated, or mandatory, bar is an arm of the state. Since it is under the full and direct control of the supreme court of the state which is the original source of policy making authority, and thus, even more than a municipality, is entitled to respect under the state action doctrine.

The other recent case, *Southern Motor Carriers Rate Conference* v. *U.S.*, is important because it holds that "The success of an antitrust action should depend upon the nature of the activity challenged rather than on the identity of the defendant."

If the nature of the activity challenged is one which comports with and "logically would result from [the] broad authority to regulate," it is protected under the state action doctrine. Thus, the court in *Southern Motor Carriers* said:

"The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace."

Addressing the matter of a private party (like a member of the bar) acting pursuant to broad state policy the Court said:

"A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. * * *

"If more detail than a clear intent to displace competition were required of the legislature, a State would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness."

There is little question that the state action exemption, since it is based on concepts of federalism, applies to the Federal Trade Commission's exercise of its antitrust authority under its mandate to prevent "unfair methods of competition." We believe the rationale of the Supreme Court's decision in *Parker* and the logic of *Town of Hallie* and *Southern Motor Carriers* apply equally to the FTC's consumer protection jurisdiction. As with the Sherman Act, the legislative history of the Federal Trade Commission Act provides no indication that Congress intended to make state action subject to the Act. The legislative history of the 1938 Wheeler-Lea amendments to the FTC Act which gave the agency its authority to prohibit "unfair or deceptive acts or practices" reveals no report language or colloquy in either the House or the Senate suggesting an intention to apply the statute to state action. Thus, both the antitrust and consumer protection jurisdiction of the FTC would seem to be limited in the same manner as the Sherman Act for the same reasons. The broad language of both the Sherman Act and the FTC Act and the absence of any apparent Congressional intention to apply the legislation to the acts of the sovereign states strongly suggest that neither statute applies to state action.

The consumer protection jurisdiction of the FTC was altered by the Magnuson-Moss Act in 1975. That Act did not change the broad statutory definition of "unfair or deceptive acts or practices" but did expand the Commission's jurisdiction to matters "in or affecting" interstate commerce. In addition, the Magnuson-Moss Act granted the FTC rulemaking authority in the consumer protection area. Like the language of the Sherman Act, the statutory language of the Magnuson-Moss Act makes no reference to the impact of the FTC consumer protection rules on state law.

In summary, nothing in the legislative history of the FTC Act or any of its amendments supports the notion that any part of that Act applies to "state action" as that term has been defined by the Supreme Court. On the contrary, to the extent legislative history on this subject exists, it strongly suggests that Congress had no different intention with respect to the FTC Act than it did with respect to the Sherman Act. Moreover, in a time of shrinking federal budgets, a new additional overlay of FTC regulation in areas already effectively regulated by the states would be unnecessary and unwise.

The Federal Trade Commission Act, interpreted in the light of these decisions is in entire harmony with Roscoe Pound's concept that—"A profession is a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because incidentally it may be a means of livelihood. * * * Next to the idea of public service the important ideas in a profession are organization and pursuit of a learned art," and that therefore it should be controlled within the judiciary itself.

Mr. Chairman this concludes my remarks. On behalf of the American Bar Association, I thank the Chairman and the Subcommittee for permitting us to present these views. I would be pleased to answer any questions you or members of the Subcommittee might have.

Senator KASTEN. Thank you very much.

Next, Mr. John Bomba, who is the president of the American Dental Association.

Mr. Bomba.

Mr. BOMBA. Mr. Chairman, members of the subcommittee. I am associate dean at Temple University School of Dentistry and currently serving as president of the American Dental Association.

We appreciate the opportunity once again to present our views on legislation to reauthorize the Federal Trade Commission and specifically amendments to make clear the limits of the Commission's authority to invalidate State laws and actions relating to the delivery of dental care to the public.

We think it is important to briefly state the reasons underlying the profession's continuing interest in this subject and the ensuing controversy. Beginning in July 1976, the Commission instituted proceedings challenging virtually every aspect of State regulation relating to the delivery of dental care services to the public, including laws and standards relating to education, training, or experience requirements of dentists and permissible tasks and duties of dentists and dental auxiliary personnel, even to the extent of challenging requirements involving the procedures that may or may not be performed on patients without professional supervision.

The excesses of FTC in this and related fields at that time led to legislation that failed by only two votes in the Senate, which would have imposed a moratorium on all of the Commission activities involving State laws regulating the professions.

Similar legislation also passed the House of Representatives in the 97th Congress.

Fortunately, these and other expressions of concern by Congress apparently had an effect on the Commission and led to its withdrawal from several areas of activity directly involving State statutes and regulations governing patient care and the quality of health services available to them.

This has been a welcome development, but it does not resolve future problems that might arise under another overzealous commission that recognizes no limit on its authority to invalidate State

laws or duly promulgated regulations of State licensing boards or State health and education departments.

In an attempt to address this longstanding need for limiting the FTC's assumed power to override State laws in the sensitive and complex area of professional qualifications and patient care, the Senate Committee on Commerce developed in the last Congress a compromise proposal to set forth a clear distinction between the FTC's authority to challenge State laws on scope of practice and related health care issues on the one hand, and laws that might be described as relating strictly to commercial practices on the other.

That proposal, very briefly, would apply the State action doctrine to FTC's unfair methods of competition authority and apply specific limitation on the Commission's use of its authority over unfair or deceptive acts or practices to invalidate State laws on licensure, education, delegation of duties, and other laws and regulations dealing with the quality of care and/or the health and safety of patients.

While we did not consider that legislation to be as broad a protection as the situation calls for, we as well as the American Medical Association supported its adoption as a step in the right direction. Chairman Miller of the FTC also supported that legislation.

Unfortunately, the bill did not reach the Senate floor for consideration before adjournment of the 98th Congress and the existing authority of the FTC was extended for an additional year.

Last week, in a major shift of position, the American Medical Association, testifying at a similar hearing in the House, withdrew its support for statutory limits on the FTC's authority to invalidate State laws regulating the professions. The American Bar Association also joined in this position.

Instead, our colleagues in the medical and legal professions recommended that no statutory limits be imposed, apparently because of an improved regulatory climate at the FTC, in the hope that the courts will limit the Commission's authority through broader application of the State action doctrine.

We voiced then and voice now our disagreement with the revised positions of these two highly respected professional organizations. We believe it would be much more preferable for the committee to retain the professions language contained in last year's bill, with a technical amendment making clear that no expansion of FTC authority to invalidate State laws is intended.

We also recommend an amendment making clear that the State action doctrine applies to the Commission's authority over unfair or deceptive acts or practices, as well as to its antitrust authority.

With these provisions in place, Congress and the courts, rather than the FTC would define the limits of Commission authority to invalidate State laws in these critical areas of public health and safety.

In light of the voluminous and confusing legislative history that has accumulated on this issue in the House and the Senate over the past 7 years, we respectfully suggest that it is essential that Congress adopt the kind of definitive language we have recommended.

Finally, the Association agrees with the committee and Chairman Miller that it is important to enact an FTC authorization bill

in this session of Congress, and in addition to our recommendations we strongly support generic reform, such as the definition of unfair acts or practices, a prevalent standard for rulemaking, and notice of intervention by the FTC in certain proceedings.

We thank you for your time and attention.

Senator KASTEN. Thank you very much for your testimony.

Next is Mrs. Eunice Cole who is the president of the American Nurses Association.

Mrs. Cole.

Ms. COLE. Good morning. Thank you, Mr. Chairman.

My name is Eunice Cole, president of the Nurses Association. Appearing with me today is Thomas Nichols, who is legislative director and counsel.

We do appreciate the opportunity to present the views of our 188,000 members regarding the jurisdiction of the Federal Trade Commission over professionals.

Mr. Chairman, much of the policy debate about the future direction of health care focuses on new ways to use the forces of the marketplace and the pressures of price competition to constrain rising costs.

In 1983, the United States spent $355 billion on health care, 10.8 percent of the GNP. We agree that increased competition would be beneficial in gaining greater control over health spending. Yet, one paradox regarding competition is that the general rules of the game have to be established and in force in order to assure that all competitors will have the opportunity to compete.

Any competitive market requires monitoring from time to time to ensure that competition is open and fair, and we believe that the FTC can best fulfill this necessary role.

Mr. Chairman, the FTC has asserted its jurisdiction over professionals and professional groups and has investigated potentially anticompetitive behavior conducted under the guise of professionalism.

At the same time, however, the FTC has distinguished between the legitimate self-regulatory action by professionals and their associations and unwarranted restraints on professional practice with the purpose of effect of stifling competition and impeding innovation.

It has been stated that the FTC is attempting to circumvent the role of the States and regulate the activities of professionals. We believe this view is without foundation, and instead believe that the FTC has an important role of watchdog over certain activity.

Regrettably, there are significant abuses which occur at the State level in which the FTC should be encouraged and permitted to intervene. We would like to provide the committee with one such example of anticompetitive practices at the State level which attempt to restrict nurses from providing health care services that they have been educated to perform.

A case decided last year by the Missouri Supreme Court illustrates the continual harrassment of nonphysician providers by certain elements of the medical community. The principals in the case were two nurse practitioners employed by a family planning clinic in rural Missouri. They were providing routine gynecological care under written protocols and with physician backup to 5,000 pa-

tients annually. They were acting pursuant to a change in the State Nurse Practice Act which had been passed by the State legislature in the late 1970's, which expanded the scope of nursing practice.

Four years ago, the Missouri Board of Healing Arts threatened action against both the nurses and physicians at the clinic, thus denying health care services to residents in the area.

To forestall this attempt to close the clinic, the two nurse practitioners and the five physicians sought a permanent injunction against the medical board. The board in a countersuit stressed that the nurses were exceeding their scope of practice, that they often worked without immediate physician supervision, and that they dispensed drugs under standing orders.

At trial, the clinic team maintained that their practice conformed with national standards for specialty practice and with the State's revised practice act. The circuit court judge, however, found the nurses guilty of practicing medicine without a license when they conducted pelvic exams and used the findings to diagnose their patients. He also found the clinic physicians guilty of aiding and abetting the nurses in violating State medical laws.

On appeal, the Missouri Supreme Court vindicated the two nurses from the charge. The court found nothing in the law to prohibit the use of standing orders and protocol. It noted as significant the legislature's adoption of an open-ended definition of nursing practice and it stressed that changes in the practice act reveal a manifest legislative intent to expand the scope of authorized nursing practice and to avoid statutory constraints on the evolution of new functions for nurses.

This ruling was a victory for both the nursing profession and consumers who desire the freedom to choose which individual practitioner will provide their health care.

Regrettably, as our written statement indicates, it is not an isolated example. This case reflects all too clearly the continual and ongoing harassment of the nursing profession and clearly demonstrates the need for vigorous antitrust scrutiny of the professions.

Mr. Chairman, the American Nurses Association continues to support legislation passed last year by the House Energy and Commerce Committee, H.R. 2970. We believe this carefully drafted compromise balances the legitimate self-regulatory concerns of the professions with the need, as reflected in our above example, for continued oversight by the Commission of unwarranted anticompetitive regulatory restrictions on professional practice.

At the same time, we are currently studying recent proposals to include no language regarding professions in the FTC reauthorization. We must insist, however, that whichever option the committee chooses continues to permit FTC authority over anticompetitive and predatory practices by professionals, particularly by State regulatory board of one profession against another profession.

Such conduct in no instance can be shielded by the antitrust laws.

Thank you very much.

Senator KASTEN. Thank you. I just want, for the record, there are a number of different nurses associations, and from time to

time your registered nurses and LPN's and whatever agree, and sometimes they do not agree.

You are speaking here on behalf of the American Nurses Association, which I understand is an umbrella group which includes all these various subgroups. Is it my understanding that your testimony is the feelings of all of these various subgroups within the overall nursing category?

Ms. COLE. I would say yes.

Senator KASTEN. Thank you.

The next witness is Mr. Stephen Fogleman, who is the Counsel for the National Association of Optometrists and Opticians.

Mr. Fogleman.

Mr. FOGLEMAN. Thank you, Mr. Chairman.

NAOO is comprised of vision care firms. Some are large like Pearle Vision Center and Sears Optical Department. Some are quite small, operating in only one or two States.

We believe that past action by the FTC in the area of eye care has been proper and correct, and we think that they are continuing in this vein in their new action.

In the mid-1970's, the Commission promulgated the eyeglasses I rule. This action allowed a consumer to obtain a prescription once an eye examination ended. The benefits of this rule are that the consumer then can go and shop and purchase eyewear at a location of his or her own choice.

Currently, the Commission has announced its eyeglasses II rulemaking. In our written testimony we enumerated the four types of commercial restriction that are to be addressed by this action. I would like to point out a couple of examples, though.

In the area of employment restrictions, some areas allow optometrists and opticians to come together in one location and operate, with the optometrist, obviously, providing the examination services and the optician dispensing eyewear.

Other areas do not allow this, and necessitate what is called a side-by-side location. One of our members has ascertained that the side-by-side locations increase the capital and startup costs associated with the construction by as much as 15 to 20 percent. The overhead costs on an annual basis are increased by about $10,000. This equates to about $4 per frame per sale.

Some argue that trade names, particularly with vision care firms, are confusing and the consumer does not know who is really responsible for the eye examination. It is not apparent why this confusion exists, but we have noted that there are now in certain restricted markets referral optometric centers.

Optometrists are required by law to refer patients who exhibit eye disease to ophthamologists and this is proper. But some optometrists have discovered that these patients, once they move on, they do not return for eye examination or for eyewear.

It should be noted that even among private practitioners, more than half of the optometrists practicing also dispense eyewear in conjunction with their examination services.

So these referral centers have sprung up and the benefits are evident. There is an institutional name, and regardless of the change in participating doctors, the patient can come back to that

center. We do not view these centers any different from vision care firms such as Pearle and Sears.

We would like the committee to note that what we are talking about is that we have no question that the FTC does not have authority over scope of practice and quality of care, i.e., the establishment of educational standards, licensing procedures, and the like. But in the field of optometry and with opticians, everyone is educated and licensed or trained and qualified in similar manner. Pearle does not go to a special place to obtain its professionals, nor do private practitioners. And in fact, sometimes there is crossover with private practitioners associating with a vision care firm, and vice versa.

In summary, what we advocate is that once professionals are qualified, that the consumer should have the right to choose what form of practice they desire to utilize; whether they wish to go to a vision care firm or go to a private practice. We urge this committee not to extend the State action doctrine beyond the limits already established by the courts.

We agree that a disapproval veto is the proper course for the Congress to take, and we think that the FTC continues to act properly in the area of eye care. This action does nothing but lower the cost. The quality has not suffered, and the public is better informed about the eye care available.

[The statement follows:]

STATEMENT OF THE NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS, INC.

The National Association of Optometrists and Opticians, Inc. ("NAOO") believes that it is essential that the Congress reauthorize the Federal Trade Commission ("FTC"); however, the Congress should not specifically exempt the professions or other segments of the economy from FTC jurisdiction. Although the issue of whether or not the professions should be exempt from FTC jurisdiction has been debated for several years, FTC actions have proven effective. In the area of health care, which presently represents about 10 percent of the gross national product, the FTC has assisted in cost containment by eliminating commercial restrictions in the eyecare industry. If the Congress exempts the professions from FTC jurisdiction, health care cost containment will take a step backwards.

NAOO is a trade association comprised of thirty members. Our largest member operates in forty-nine states. Our membership includes smaller organizations which operate in only one or two states. The eyecare industry is estimated to be an $8 billion industry annually; however, NAOO members represent only 10 percent of the entire market. Eyecare is a growing and competitive industry. It is estimated that among the elderly, 90 percent require some sort of corrective vision care. For those who live on a fixed income the cost of eyeglasses becomes an important issue.

All industries within our economy, whether they be manufacturing, services or professional services, contain certain aspects which pertain solely to business and commercial practices. The eyecare industry separates the provision of professional services (eye examinations) from the dispensing of retail goods (eyewear such as eyeglasses). When an eye examination ends, the patient becomes a consumer when choosing which types of frames he or she wishes to wear. The decision regarding frame selection revolves around pricing and cosmetic considerations.

In the past, the FTC has taken action in the eyecare industry which has done nothing but deregulate the industry and provided competition that resulted in the lowering of costs to the consumer. The FTC has never intruded upon scope of practice, i.e., those areas that pertain to the quality of care and the judgment of a vision care professional. The FTC has addressed only form of practice, i.e., those acts and practices which are purely commercial in nature; and it is clear that there is a manifest difference between the regulation of professional standards and judgment, on the one hand, and the regulation of the retailing of eyewear on the other.

The Eyeglasses I rule removed restrictions on the advertising of professional services and goods and on the prohibitions against releasing the prescription (of correc-

tive lenses) to a patient. While the advertising issue was addressed by Supreme Court, the prescription release provision survived a court challenge. Simply stated, the FTC argued that once a patient received an eye examination that patient should be allowed to take a copy of the prescription and comparison shop for eyeglasses. Opponents of the Eyeglasses I rule argued that the quality of care would suffer because commercialism would be introduced into the professional services aspect of an eye doctor. This argument seems to ignore the fact that most optometrists chose not only to examine and refract patients but also to dispense eyeglasses and contact lenses in conjunction with the examination practice. Whether or not a consumer decides to receive an eye examination and to purchase eyewear from the examiner or to go to another qualified provider of eyewear such as an optician or vision care firm is a choice best left to the consumer.

The FTC has recently announced the Eyeglasses II rulemaking. This rulemaking is an extension of the Eyeglasses I rule. The Notice of Proposed Rulemaking in the Federal Register, which is appended to this testimony, proposes to remove four types of commercial restrictions presently found in various markets. These commercial prohibitions are:

(1) Restrictions on employment relationships between either corporations and optometrists or optometrists and opticians;

(2) Restrictions on the location of branches such as establishment of a branch in a mercantile department store or shopping mall;

(3) Limitations on the number of branches which a vision care firm might operate; and

(4) Bans on the use of a trade name.

A copy of the NAOO written comment regarding this rulemaking has been provided to the Committee staff.

Opponents of the Eyeglasses II rulemaking are stating that there is no need for the FTC to go further in the eyecare industry because of advertising and the prescription release formula which have provided competition in this industry. This argument is inconsistent in that these same organizations also opposed the Eyeglasses I rule which permitted advertising and prescription release in this industry. Studies undertaken by the Bureau of Economics of the FTC have indicated that there is between 17 percent and 35 percent of a cost-differential between states which allow commercial restrictions and those states which allow commercial restrictions and those states which have no commercial restrictions. The unrestricted markets have lower costs in eyecare and eyewear. The FTC study is buttressed by several independent studies in this area.

Employment restrictions do not enhance the quality of care to the American public, but only result in higher costs associated with the provision of eyecare. As mentioned previously most private practitioners in this industry choose to dispense eyewear in conjunction with the examination service. Employment restrictions in some states prohibit vision care firms or corporations from employing professionals. In other states the restrictions require that the optometrists practice in a side-by-side location with an optician. That is to say that there are two locations, two doors, two rooms, when in other areas these same services are rendered under one roof. Side-by-side locations increase the capital costs necessary to commence operation and necessitate an increase in the overhead costs annually. Obviously the increase in overhead costs and in start-up costs are passed along to the consumer in the form of higher costs.

Further, it is not apparent why the operation of a vision care outlet should equate to lower quality in a department store, such as Sears, than in an identically staffed and equipped location found in a non-mercantile building. Some argue that a landlord, such as a shopping mall, would exert negative influence over the eye doctor and his professional judgement. An individual who is so weak as to have his or her professional judgment influenced for clearly economic reasons is likely to be so influenced whether working in a private firm or in a vision care firm.

Some boards of optometry mandate an absolute limitation on the number of branch locations a vision care firm or eye doctor may operate. This limitation is absolute whether or not the vision care firm would employ eminently qualified doctors and equip each location with the very latest in equipment. Certainly an absolute limit on the number of locations goes to the very heart of commercial practice. Such a restriction, assuming that each location would be staffed by licensed and qualified personnel who utilize the same equipment and procedures as private firms, is directed at restricting competition with no regard to the quality of care offered.

The ban on the use of a trade name is promoted in certain markets as ensuring the quality of care to the consumer. Some feel that the use of a trade name, such as Pearle Vision Center or Sears Optical department, would confuse the individual

about who is responsible for that eye examination. Presumably, the consumer would become confused about whether or not the optometrist is responsible for his services or whether the location owner is responsible for the services. It is interesting to note that proponents of bans on the use of trade names feel that such names convey false information. This belief seems to fly in the face of what the American public finds in all other industries, in all other sectors of our economy, that is that trade names are a benefit to the public for purposes of locating goods and services and evaluating the precise quality of goods and services offered at such locations.

It is also been observed that private practitioners, i.e., optometrists, who are required by law to refer to ophthalmologists those patients who exhibit eye disease, are now grouping together because they have found that some patients, once they go to ophthamologists never return for further examination and eyewear. These eyecare centers are no more or less confusing than Pearle Vision Centers or Sears Optical departments.

NAOO urges this Committee not to adopt any restrictive language regarding the FTC's jurisdiction over the professions. We believe that the courts will properly interpret the jurisdiction of the FTC in areas of professional judgment and scope of practice. We also believe that the courts will recognize those commercial acts and practices which are not based on quality of care but only pertain to competition and pricing. Any extension of the state action doctrine by the Congress beyond those limits established by the courts will impact adversely on the consumer. Specifically, any adoption of state action doctrine language to the consumer protection authority of the FTC will impede the rulemaking ability of this agency.

With regard to the legislative veto, NAOO believes that a disapproval veto is the only proper course for the Congress to adopt. If the Congress adopts an approval veto, whereby any rulemaking authority of the FTC must be affirmatively approved by the Congress, then the Congress, not the agency, will become the rulemaking authority. A disapproval veto would grant authority to Congress to disapprove any rulemaking which was found to be contrary to public policy and would be an effective and proper check and balance. Certainly, the history of the professions issue regarding the FTC is good example of Congressional oversight. This issue has been fully reviewed not only by the authorizing committees but also by the appropriations committees.

In summary, we believe the FTC has never exceeded its authority regarding the eyecare industry. Instead of adding regulations to our society, FTC action in this area has been deregulating in nature. The result has been a more competitive industry and a public which has become more informed regarding eyecare.

Senator KASTEN. Thank you for your testimony.

The next witness is Mr. Jay Angoff, staff attorney of Public Citizen/Congress Watch. And I should say I am happy to have a chance to be working with the Bar Association and with Public Citizen/Congress Watch on something other than product liability.

Mr. Jay Angoff.

Mr. ANGOFF. Well, we are happy, too, Mr. Chairman, and I know that we don't agree exactly 100 percent of the time, but we would like to point out that we strongly believe that your proposal on legislative veto, to have a joint resolution of disapproval without impairing the appropriations process, is highly preferable to the Levin-Grassley proposal.

Also, we are hopeful that we can agree on this issue. I think the question that the Congress has got to consider is should Congress set the limits of the FTC's jurisidiction over professionals or should Congress let the courts set the limits of that jurisdiction?

And we can support doing it either way, but we think that in both categories, there are right ways to do it and wrong ways to do it. And I think the people at this table have all got reasonable views, with one exception.

And I would like to just go through those views briefly right now. Based on what Dr. Boyle said, it seems to me that the AMA is saying today that they would support no language, which is something that we could support, too.

In the House, on the other hand, they said that they could support no language on the consumer protection side, but the State action doctrine on the antitrust side, and we think if Congress does make the decision to let the courts define the limits of the FTC's authority, then it should make that a consistent decision and truly adopt no language on either side.

The American Bar Association says that explicitly; they want no language. Now, the tone of their statement is something that we disagree with strongly. It seems that they believe that the FTC currently has no jurisdiction over professionals. We strongly disagree with that.

It seems to me that they are saying that just because a State supreme court regulates lawyers for some purposes, therefore, if those lawyers fix prices, that just the fact that they are regulated by the State for other purposes should immunize them from attack by the FTC for price fixing. We disagree with that, but they are willing to fight it out in court, and so are we. So we could accept no language.

In contrast, the Senate bill last year contained a provision that was agreed to at that time by both Chairman Miller of the FTC and the AMA which would fairly strictly limit the FTC's authority over professionals by applying the State action doctrine on the antitrust side and on the consumer protection side by setting out—in we think too strict, but nevertheless reasonable language—what the FTC could and could not do.

And then finally, the House bill last Congress was somewhat different from that. We think it was better both because it did not limit the FTC's authority quite as much as did the Senate bill, and we do not want the FTC's authority limited quite as much. And in addition, we just think it was drafted better and that it was more explicit, it was more clear what the FTC could and could not do.

But as I said, I think all those proposals are reasonable. There is one unreasonable provision that has been urged, and that has been by the American Dental Association. What they would like to do is to apply the State action doctrine, which has traditionally been and can only be, by definition, a doctrine applying on the antitrust side, to consumer protection side.

The basis for the State action doctrine is that if a State makes a policy decision to substitute regulation for competition, then private activity which follows that State decision should not be challenged under the antitrust laws. That is a reasonable doctrine.

You cannot just, though, apply that doctrine to the consumer protection side. If you try to do it, it just does not make sense. What it would mean is that a State could make a decision to substitute a regime that prohibited unfair or deceptive practices with a regime which affirmatively supported unfair or deceptive practices. It just does not make sense; it cannot be done. But the clear intent of suggesting that is, again, somewhat similar to what some groups would like to have done in the past; that is to say that just because a State is regulated for some purposes by—just because a private group is regulated for some purposes by the State, therefore it is immunized from attack for anticompetitive activities by the Federal Government.

So in conclusion, Mr. Chairman, we think if you make the decision, if this committee makes the decision that the courts should deal with the FTC's jurisdiction over professionals, it should do that in a consistent way, not have any language applying to professionals.

On the other hand, if it does want to define the jurisdiction of professionals, then I would say the House bill is somewhat preferable to the Senate bill.

Thank you very much.

[The statement follows:]

STATEMENT OF JAY ANGOFF, STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESS WATCH

INTRODUCTION

The FTC has both antitrust authority—the authority to prohibit "unfair methods of competition"—and consumer protection authority—the authority to prohibit "unfair or deceptive acts or practices."

Since the 96th Congress, when the full Senate narrowly rejected an amendment that would have exempted professionals from FTC jurisdiction, Congress has considered the extent, if any, to which the FTC's jurisdiction over professionals should be limited. In the 97th Congress this Committee approved a total exemption from FTC jurisdiction for professionals, but the full Senate rejected the exemption. In contrast, the professionals exemption was not included by the House Energy and Commerce Committee in its FTC authorization bill, but was added to the bill on the House floor.

Following the defeat of the exemption in the Senate, and after long negotiations, during the 98th Congress the American Medical Association and FTC Chairman Miller agreed on a provision that would limit the FTC's jurisdiction over professionals but not eliminate it. This Committee incorporated the Miller-AMA provision into its authorization bill, and the House Committee incorporated a similar but not identical provision in its bill. The FTC authorization bill did not reach the floor of either house during the last Congress.

PAST PROPOSALS

A. The Miller-AMA provision (the 1983 Senate bill)

With respect to the Commission's antitrust jurisdiction, the Senate bill applied the so-called "state action" doctrine developed under the Sherman Act to cases brought under the FTC Act. Under the state action doctrine, price-fixing and other anticompetitive activities are immune from Sherman Act prosecution if they are undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy, and the state "actively supervises" that policy. *California Retail Liquor Dealers Association* v. *Midcal Aluminum*, 445 U.S. 97 (1980); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). When this Committee adopted the Miller-AMA provision in August 1983, for anticompetitive activity to meet the "clearly articulated and affirmatively expressed" test and thus to be exempt from Sherman Act attack it had to be compelled by the state. See report on S.1714, 98th Cong., 1st Sess., Sept. 1, 1983, at 10.

With respect to the FTC's consumer protection authority, the Senate bill prohibited the FTC from using that authority to invalidate state laws that established either: (1) training, educational or experience requirements for licensing professionals; or (2) permissible tasks or duties that professionals may perform based on specialized training or education.

B. The 1983 House Bill

Like the Senate bill, the House bill applied the "state action" doctrine to antitrust cases. And like the Senate bill, it prohibited the FTC from using its consumer protection authority to invalidate state laws that establish professionals' education or training requirements or tasks and duties that are based on specialized training. Unlike the Senate bill, however, the House bill expressly provided that for the limitation on the FTC's jurisdiction to apply, such tasks must "in fact" be based on specialized training: the FTC must apply an objective test. In addition, the House bill

expressly provided that the Commission's authority over the business practices of professionals remain intact.

NEW DEVELOPMENTS

A. The Southern Motor Carriers Case

Prior to *Southern Motor Carriers Rate Conference, Inc.* v. *U.S.*, U.S. (March 27, 1985), anticompetitive activity had to be compelled by the state to be immune from Sherman Act attack. See Report on S. 1714 at 10. In *Southern Motor Carriers*, however, the Supreme Court held that such activity could be immunized if it were merely permitted by the state. Moreover, while the opinion is not entirely clear or consistent, some of its language suggests that the state need not even expressly permit anticompetitive activity to immunize it.

Because the state action doctrine has been significantly expanded by the *Southern Motor Carriers* case, some of the parties involved in the debate over the FTC's jurisdiction over professionals have substantially altered their positions.

B. Public Citizen's Congress Watch Position

The *Southern Motor Carriers* case is a setback for those who want doctors, lawyers, and other professionals to be subject to the full force of the antitrust laws. Nevertheless, we believe that it is the job of the Supreme Court to interpret the antitrust laws, we do not believe Congress should lightly interfere with the ongoing development of those laws, and we therefore do not ask Congress to overrule, or to in any way limit, the Supreme Court's decision in *Southern Motor Carriers*.

We have two altrenative proposals. First, if this Committee believes that Congress should set the limits on the FTC's jurisdiction over professionals, then we strongly urge the Committee to adopt the language from the House bill. In contrast to the Miller-AMA provision, the House bill makes explicit that a professional board can not immunize its members' unfair or deceptive practices from FTC consumer protection challenge merely by reciting that such practices are based on specialized training or education. Rather, those practices must in fact be based on specialized training. We also prefer the House bill's limitation on the FTC's consumer protection authority because the House bill expessly provides that those limitations do not limit the FTC's authority over the commercial practices of professionals. With respect to the FTC's antitrust authority, while we believe *Southern Motor Carriers* was a bad decision, if Congress believes that it should statutorily limit the FTC's jurisdiction over professionals then it makes sense for Congress to apply the state action doctrine to cases brought by the FTC.

If, on the other hand, this Committee believes that the courts should interpret the FTC Act as it applies to professionals, then we urge the Committee to make no statutory change in the FTC's jurisdiction—neither by applying the state action doctrine to FTC antitrust cases nor expressly limiting the FTC's consumer protection authority.

Under the Sherman Act anticompetitive activity can be both prohibited and punished: not only can the government enjoin anticompetitive activity, but it may seek criminal penalties of up to $1 million and prison terms of up to 3 years, and private parties can sue those engaging in such activity for treble damages. It does not seem fair to subject defendants who engage in activity that is "clearly articulated and affirmatively expressed as state policy" and "activity supervised" by the state—even if such activity would clearly violate the antitrust laws—to the possibility of 3 years in jail, a $1 million fine, and treble damages.

Under the FTC Act, on the other hand, the government can only issue a cease and desist order. It cannot seek criminal penalties, and private parties may not sue for single damages, let alone treble damages. (If a respondent violates a final FTC order, it may then be subject to relatively minimal civil penalties, but the most the FTC can do in the first instance is to tell the respondent not to do it again.)

Thus—because parties can be punished for violating the Sherman Act, but not for violating the FTC Act—the state action doctrine should apply to Sherman Act cases, but need not apply to FTC cases.

C. The AMA Position

The AMA asked the House Committee last week to apply the state action doctrine, as expended by *Southern Motor Carriers*, to the FTC's antitrust authority. It emphasized that it wanted no change in the FTC's consumer protection authority. It

assured Chairman Florio of the House subcommittee that it will take the same position in the Senate.

We can support one half of the AMA's proposal. We would point out, however, that the AMA is not asking for no statutory change in the FTC's jurisdiction over the professions. If Congress decides that it should not statutorily limit the FTC's jurisdiction over professionals, then we would hope it maintains a consistent policy and leaves both sides of that jurisdiction untouched.

D. The American Dental Association Position

The ADA supports the Senate bill, and in addition wants the "state action" doctrine applied to the FTC's consumer protection authority.

To suggest applying the "state action" doctrine to the FTC's consumer protection authority, however, reflects a lack of understanding of the basis for that doctrine. Although the Supreme Court has altered the contours of the doctrine somewhat since *Parker* v. *Brown* in 1943, the underlying rationale for state action immunity has remained the same: if a state makes a clear policy decision to supplant competition with regulation in a particular field, then those who follow that policy should not be punished under the antitrust laws. Such a doctrine can not simply be "applied" to the FTC's authority over unfair or deceptive acts or practices.

The goal of the ADA proposal is apparently to allow a state board to immunize its members' unfair or deceptive practices from FTC consumer protection challenge to the same extent that it could immunize its members' anticompetitive practices from FTC antitrust challenge. Were the courts to interpret the *Southern Motor Carriers* case broadly—for example, by allowing state regulation of professionals, without more, to immunize professionals from FTC attack—the ADA's proposal would have the same effect as the total exemption it sought in prior years.

E. The Legal Profession's Position

Of the four legal organizations that testified in the House, three—the Federal Bar Association, the Washington Council of Lawyers, and the New York Antitrust and Trade Regulation Committee—very explicitly stated that they did not believe lawyers should be above the law and that the FTC's jurisdiction over lawyers should not be limited in any way. The tone of the American Bar Association's statement, in contrast, was that lawyers should be above the law. Specifically, the ABA seems to argue that because state Supreme Courts may regulate lawyers for some purposes, that regulation should immunize anticompetitive or deceptive practices they may engage in from FTC challenge.

Nevertheless, the ABA says it is "convinced now that the law, as it is, affords the most salubrious way to protect the integrity of the state courts' control of professional practice," and assured Chairman Florio that it seeks no statutory change.

I would be happy to answer any questions the Committee may have.

Senator KASTEN. Thank you very much, Mr. Angoff, and thank you all.

I want to try, if I can, to narrow down this question. A lot of people are getting to the same place from entirely different directions. That happens on the legislative side often, too, so I am not complaining about that. But there still is some disagreement here as to whether the professions compromise of Senate bill 1714 is a necessary part of the FTC authorization.

I would like you to—and we will just start at one end of the table and go across—to tell me specifically what is the impact, what would be the impact on the organization that you represent if the FTC compromise language on the professions would be eliminated. The elimination of the compromise language would have what effect on the Bar Association, Mr. Dougherty?

Mr. DOUGHERTY. Mr. Chairman, we think it is fairly clear that if you say in the statute that the FTC may not regulate activities A, B, and C, those will be the sole activities that will be excluded from FTC jurisdiction. You create a watershed. All other activities which

someone might under certain circumstances think have commercial aspects, would be open to regulation by the FTC.

This is the language that the American Bar Association would oppose because of the reverse implication of carving out only two or three areas of activity and saying that the States may regulate.

It seems to us much better to leave that matter to the decision of the courts. The Bar Association, as it did last year, and purely as a defensive matter, would have to oppose that position.

I believe that we have got pretty nearly a consensus that we are better off—across the board—if we leave this matter outside of the statute and to the courts; that, it seems to me, will produce an FTC reauthorization act, which we should have.

It seems to us that this is a desirable result at this time. We do not want to have to oppose reauthorization because of this implication. But we may feel constrained to take that position because of what we feel the effect, the actual effect of it as a matter of statutory construction, would be.

Senator KASTEN. And you are speaking as a representative of the American Bar Association, not as a representative of the Texas Bar; is that right?

Mr. DOUGHERTY. That is right.

Senator KASTEN. Thank you, sir.

Mr. DOUGHERTY. The Texas Bar feels strongly that the American Bar Association is extremely correct, you understand.

Senator KASTEN. I am aware of that.

Mr. DOUGHERTY. The ABA shows great wisdom. But I am speaking in this instance as a representative of the American Bar Association, as a current member of its house of delegates and by direction of its president.

Senator KASTEN. Mr. John Bomba, what would be the effect—I know that you are not in favor of it—what would be the effect, though, what impact would the elimination of this compromise language have on the group you represent, the American Dental Association?

Mr. BOMBA. We think that, first of all, our objectives are similar and that we are not as far as perhaps some might imagine. But it seems to me that anything we can do to clarify the precision of the language of the act will minimize the likelihood that those disputes will get to the courts, and that is our position.

We are not saying that the statute does not already indicate that our position is correct, but that each and every time the FTC would exceed its authority, we would have to go to the courts to resolve that.

Despite the fact that there has been a presentation, that there have been several court decisions which support that aspect of law, none of those decisions were impacting directly on professional activities. They were commercial activities, and so we don't see how it could harm the law to go back, if it were necessary, to what we agreed to as a compromise last time.

We were willing to make that compromise at that time, but now that the opportunity is open again to perhaps improve the language of the act further, we think that that's a wise course of action.

Senator KASTEN. Thank you.

Ms. Cole, what impact would the elimination of the compromise language have on the group that you represent, the American Nurses Associaton?

Ms. COLE. I would like Mr. Nichols to respond to that.

Mr. NICHOLS. Mr. Chairman, I think that the option of no language is a fairly recent one. It was not one that has really been taken seriously for the past 4 or 5 years and we simply learned of it 7 days ago.

As a result, we are trying to figure out exactly the answer to your question: What would it mean if you have no language? We want to take the worst possible scenario from our perspective.

Someone might argue that Southern Motor Carriers gives in effect a blanket exemption to State medical boards, because if we are going to say that simply because the State creates a board that it has exemption from the antitrust laws, that is not good news for us. I don't think that was ever the intent of either the House or the Senate committee in both of their compromises, however different, to allow that kind of broad exemption for medical boards.

We have in our testimony numerous examples of abuses at that level. If we accept the worst case scenario that they gave me, exactly what I just said, that it is a complete exemption, then I think this committee affirmatively must state that that is not the intent of Congress. It is not the intent of Congress to allow medical boards, any kind of regulatory boards, nursing boards included, a complete exemption because of the Supreme Court cases.

As I said, we are trying to figure out exactly what this case means. We want to work together with the committee in order to get there.

Senator KASTEN. Mr. Fogleman, what impact would the elimination of the compromise language have on the groups that you represent?

Mr. FOGLEMAN. We agree with Mr. Angoff's assessment of all the alternatives. If, in fact, it is no language at all, that is a reasonable approach.

Eyeglasses I was challenged in court, and we fully expect the Eyeglasses II rulemaking to be challenged in court. We think the Commission has very correctly and carefully defined commercial practice from quality of care. We could support that, although it would cause us some sleepless nights while we are waiting for the challenge.

Senator KASTEN. Mr. Angoff?

Mr. ANGOFF. The impact on us would be if there were no language, we would just try to get the FTC to bring more cases because then obviously the limits would be set by the courts.

The question here is for all groups whether they want to accept a sure half loaf or go for everything in court, and what the ABA is saying is that they are willing to try for everything in court. And we are willing to do that, too.

Whereas both the Senate bill and the House bill, although they draw the line in different places—and we think the House bill draws it in a better place—both the Senate bill of last Congress and the House bill say the FTC definitely can do certain things and they definitely can't do certain things.

And as I said, we would prefer the House language if there is going to be language.

Senator KASTEN. Dr. Boyle, what is the effect of the elimination of the compromise language on the American Medical Association?

Dr. BOYLE. Mr. Chairman, just before responding directly to that, for the record, to make certain that there is no misunderstanding, our association does support the incorporation of the State action doctrine into the FTC act, as we gave you in our written statement.

At the present time, it is the view of our association that no language is needed. In addition to that, we believe that it could be counterproductive because the things that we as a profession or a professional association believe need to be done by our professional associations now could be substantially limited by the incorporation of any of the languages that have been proposed.

As an example, we have very serious concerns about some of our members who are guilty of aberrant practices, who are incompetent, who are negligent and produce injury. We are constantly looked to by the public to provide some protection for individual patients against the actions of these kinds of licensed M.D.'s.

We have similar complaints that have to do with physicians taking undue advantage of patients, in fee gouging, and in exorbitant charges

In the State of California, we have a voluntary agreement between the State licensing board and the State medical association which also does involve our component county medical societies and can extend into hospital medical staffs. So, that these bodies, in the process of peer review, are able to identify those practitioners guilty of these kinds of transactions and would then have, as we read the law now, following the *Southern Motor Carriers* case, would have the opportunity to exert the kinds of discipline which we think are necessary, but which could be interfered with, or at least the perception is, could be interfered with by some of the limitations that might be placed upon the professions by the incorporation of either of the sets of language.

We believe that the law is evolving. We believe that the change and increased sophistication on the part of the FTC in recognizing our legitimate concerns in establishing, monitoring and maintaining standards of practice, and in the manner in which our members deal with their patients and with the public are such that we would be far better off right now without language and see what does evolve as the law changes in the future.

If it has to go to court, so be it.

Senator KASTEN. Thank you.

Before we close the hearing, I just want to say that I think we are closer to resolving this issue, and especially if we don't worry about how we got there, we are closer to resolving this issue than we have been in a while, and that there may be ways that we can work ourselves through this.

I very much want to have an FTC reauthorization bill in place this year. We are going to try to deal with this issue in the committee. It may be necessary to deal with this issue on the floor as well, but we definitely will address this issue in the committee.

As I said earlier, it is not clear whether we are going to try to address the legislative veto issue in the committee or if we will simply defer that for floor action.

But I believe that because of the strength of the testimony of all the people today, I think it is clear that we have got a need for a Federal Trade Commission reauthorization bill; that a lot of the questions that had been raised in other parts of the bill now seem to be basically worked through.

The bill that we will pass out of this committee will be similar to the legislation which we had in the last Congress, and I am optimistic that working with all of you, we are going to reach our shared goal.

So, on behalf of the Consumer Subcommittee, I would like to thank all the witnesses. We have heard thoughtful comments. The record of the hearing will be held open for 1 week. That is for additional statements that may come from other members of the panel and possibly for additional statements and questions and answers back and forth which will be submitted to some of you.

I might add that we have only been at this no language idea for a short period of time, and we expect you to continue to work with us as we work toward a markup.

Thank you very much for your testimony. The hearing is now adjourned.

[Whereupon, at 11:35 a.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. MARK O. HATFIELD, U.S. SENATOR FROM OREGON

Mr. Chairman, I understand the Subcommittee has under its consideration legislation by Senators Levin and Grassley to provide a legislative veto over the implementation of agency rules. I would like to register my strong opposition to a provision of that bill which would institute a new point of order on appropriation measures.

As proposed by the legislation, if the Senate and House pass a joint resolution disapproving the implementation of a rule, a point of order would lie against any appropriations bill, amendment, or resolution providing money for the relevant agency, unless such vehicle contains an express prohibition on the use of any of the appropriated funds for the implementation of the rule disapproved. The proposed point of order would lie regardless of whether or not the joint resolution of disapproval had been enacted into law.

Mr. Chairman, this is an unwarranted restriction on appropriation activities. It does nothing to further the intent of the legislation proposed.

Under the Levin-Grassley legislative veto bill, a disapproval resolution must be passed by both Houses of the Congress and signed into law by the President. To further require that the relevant appropriations measure carry an express prohibition on the use of funds appropriated to implement that same rule would be redundant. Our expectation should be that the affected agency will abide by the law prohibiting the implementation of the rule and that no further action be required.

In the case where a joint resolution disapproving a rule is passed by both Houses of the Congress but has not yet been signed by the President, or the Congress has not yet acted to override a Presidential veto, I can understand the concern of the proponents of this legislation. In such case, there may be a "window of time" for the affected agency to promulgate the rule before final action it taken. However, a requirement that the relevant appropriations measure contain a back-stop prohibition on the use of funds to implement that rule is not necessarily a solution to this problem. There is no guarantee that the appropriations provision would be enacted in time to "close" that window. At any time such an appropriations prohibition would prevent an action contrary to the express will of the Congress, I believe you would find this Chairman and the members of the Appropriations Committee open to such a solution.

It is preferable to take appropriations action when such a case arises, rather than to mandate appropriations action that may be unnecessary with a consequent procedural bar against consideration of an entire appropriations measure. The proposed point of order would merely frustrate the appropriations process.

For these reasons, Mr. Chairman, I hope your Subcommittee will reject the point of order on appropriations proposed by the Levin-Grassley bill, or any other similar restriction on appropriations. Such a restriction would be simply gratuitous.

STATEMENT OF THOMAS J. MILLER, ATTORNEY GENERAL, STATE OF IOWA

FEDERAL CAUSE OF ACTION FOR STATE ATTORNEYS GENERAL

The need for effective consumer protection in this country has never been greater. Fraud has always been a threat to consumers in the market place. historically, fraud schemes have posed a difficult law enforcement problem. Technological change, however, has made it possible for almost every fraud to become a national problem. Con artists move at will across state lines, and incorporate sophisticated systems of mass mailings and telephone solicitations. Yet, law enforcement efforts have not kept pace with technological advances. Too often, too few resources are committed too late, and too often our enforcement response is too fragmented to be effective.

A changing policy in Washington has generally resulted in states being required to assume more of the responsibility to protect the public safety and welfare. Unfor-

tunately, there has been no conpensatory release of federal tax dollars for state use. Therefore, it is incumbent upon us to implement new and imaginative solutions that do not significantly increase the burden on our taxpayers. The proposed amendment to the Federal Trade Commission Act that would allow states to prosecute enforcement actions under the Act offers such a solution.

The proposed amendment to the Federal Trade Commission Act authorizes state Attorneys General to prosecute violations of section 5(a)(1) of the Act, and Federal Trade Commission rules and orders. Injunctive relief, once obtained, would be enforceable thorughout the United States either by the Federal Trade Commission or individual states. States could more effectively combine their resources, where appropriate, to prosecute cases of national significance. The complaints of consumers from many states could be pooled in a single action.

At the spring meeting of National Association of Attorneys General, the Attorneys General approved without dissent a resolution urging Congress to adopt this legislation. I have attached a copy of the resolution to my written statement. The Attorneys General believe that the proposed legislation would enable them, acting singly or in a multistate cooperative effort, to obtain injunctions and remedies that would benefit consumers of all states, and thus enhance and supplement the enforcement efforts of the Federal Trade Commission.

The perpetrators of consumer frauds victimize consumers in many states at the same time, and often move freely from state to state, creating victims in several states concurrently and consecutively. Interstate and multistate frauds cannot be effectively stopped by any one state. A state court's jurisdiction to enjoin consumer fraud stops at the state border. The perpetrators of consumer fraud recognize no such artificial distinctions. Each state is forced to bring separate enforcement actions. The duplication of effort constitutes a shameful waste of resources.

As an example, virtually every state is now plagued with fraudulent interstate "wats line hustlers". It is estimated that $300,000,000 a year is lost. Many of these schemes are aimed at small businesses. One current scheme concerns the sale of toner for copy machines. Toner solicitors misrepresent their identity, and offer the product at what is supposed to be a bargain rate. The purchaser finds out too late that the purchased product is inferior, non-existent or dramatically overpriced.

There are literally thousands of individuals, using fictitious company names, operating fraudulent telephone solicitation schemes right now. Most operate out of California or one or two other states. These fraudulent operators are careful not to victimize businesses in their own states. So far, law enforcement efforts under existing federal and state laws have not been successful in curbing the volume of such solicitations. The state of Kentucky may sue a particular perpetrator and obtain an injunction. However, that injunction is worthless in Iowa and the other ten or twenty states that are being worked by the same perpetrator.

It is not unusual for several states to investigate the same company at the same time. There are numerous examples. More than ten states were involved in the investigation of the manufacture and sale of defective heat pumps by Fedders Corporation. Thousands of defective units were sold to consumers around the nation and, while the states did cooperate in the investigation, no truly national solution was available. The Attorneys General of Illinois, Missouri, Alabama and Iowa investigated the promotion of retirement villages by a Dr. Kenneth Paul Berg. Numerous elderly Americans lost substantial amounts of money, some their life savings. Again, law enforcement efforts were diminished because the restitution efforts and injunctive relief in one state did not benefit victims in the other states. More recently, Wisconsin, Minnesota, and Iowa have investigated allegations of insurance packing against Thorp, a subsidiary of ITT Consumer Financial Corporation, which operates in over thirty-two states. Settlements have been reached in Wisconsin and Iowa. Under the current legal structure, actions would be required in each affected state to obtain relief for the consumers of that state.

The states share with the Federal Trade Commission the responsibility to combat consumer fraud. Many state consumer fraud statutes are similar or identical to section 5(a)(1) of the Federal Trade Commission Act, 45 U.S.C. § 45(a)(1). State Attorneys General have developed within their offices, staffs with the knowledge and expertise to interpret, and prosecute consumer frauds. Thus, there are available resources to fight interstate and multistate fraud that are not now being used as effectively as they could be. Only the most compelling reasons could excuse such waste.

This legislation is a modest proposal that can have a significant and beneficial national impact. There is no other proposal that offers such substantial benefit in the fight against consumer fraud, at such a low cost, as does this legislation. Congress should adopt this amendment.

RETAIL FOOD STORE ADVERTISING AND MARKET PRACTICES

The Federal Trade Commission has recently solicited comments on whether to reconsider the rule on Retail Food Store Advertising and Marketing Practices (16 CFR Part 424) (hereafter, the Rule). The Rule makes it an unfair method of competition and an unfair or deceptive act or practice for a retail food store to offer for sale at a stated price grocery products or other merchandise unless such products are in stock and conspicuously and readily available for sale to the customers during the effective period of the advertisement at or below the advertised prices.

I submitted a comment in favor of retention of the present rule. Thirty-four Attorneys General joined in that comment. I have attached a copy of the comment to my written statement.

There can be no substitute for truthfulness in advertising. The Rule codifies this basic premise as an industry standard and enhances the credibility of retail food advertising. It has provided substantial benefits to both consumers and the grocery store industry.

The Commission staff report on the Rule assumes the existence of competition in the market place. There are some indications, however, that retail food markets vary greatly in their competitiveness. It is ironic that the long range effect of abandoning the Rule could be to reduce marketplace alternatives and undermine the very assumption that the report uses to justify its conclusion.

The experience of state consumer protection divisions over the past several years shows that few, if any, consumers have filed complaints alleging that a grocery store has failed to have an advertised product for sale. On page 17 of its report, the Commission staff notes that "unavailability rates were about 10 percent prior to the Rule, fell to around 5 percent by 1973 and may have fallen to as low as 3 percent in 1978. Overpricing rates can be estimated to be between 5–9 percent prior to the Ruling fell to about 5 percent by 1973 and perhaps to 1.5 percent by 1978." Thus, there appears to be no dispute that the Rule is working.

However, the staff report concludes that "the Rule does not appear to be justified on the basis of its benefits exceeding its costs." The staff itself acknowledges that "this conclusion must be tempered by the unsatisfactory nature of some of the information on which estimates are based. . . ." Even a cursory review of the information and analysis used by the staff raises serious doubts about the reliability of the statement that the costs of the Rule exceed its benefits. In analyzing the benefits to consumers, the report relies almost exclusively on a 1979 survey conducted by Market Facts, Inc. One problem with this survey is that it did not test the frequency with which consumers have encountered grocery stores not having advertised items available. If consumers have not been exposed to unavailability to any significant degree, it is logical to assume that they would not be particularly sensitive to how they might react if availability levels were modified. Thus, I question how the survey can reasonably conclude that consumers "would not be willing to sacrifice any price or service benefits for increased availability" without testing the frequency with which the survey respondents had experienced unavailability. An additional problem with the Market Facts study in this regard is its own admission that "the unavailability issue may not have been stated in terms sufficiently relevant to consumers' interests."

In attempting to analyze the costs of the Rule, the staff report states that a major cost item is the cost of extra inventory but there is no data cited to support its assertion that the Rule has "increased overall inventory levels and the added spoilage entailed by the increase." The staff proceeds to extrapolate how much money food stores would save if the unavailability rate rose to its pre-Rule level. This estimate relies on an eight year old study the reliability of which is unknown as well as a "statement of practice" followed by one California food chain over 20 years ago. Technological improvements, such as the use of computerized product movement and inventory control systems have reduced the burden of complying with the Rule, and will continue to do so. If the future of the Rule is to be determined by cost/benefit analysis, there does not as yet appear to be adequate studies available to make valid conclusions.

We believe, however, that application of cost/benefit analysis to measure the desirability of the Rule does not adequately account for the Rule's rationale. It is necessary to look beyond a cost/benefit analysis. Statutes and administrative rules of both the federal government and the states are replete with prohibitions based on the premise that the prohibited conduct is "wrong". When the conduct is wrong, as is the conduct proscribed by the Rule, cost/benefit analysis is superfluous.

Consumers are accustomed to making major food purchases at one time, in one store rather than "shopping around". This is due to a variety of reasons including

the expense of transportation, the amount of time consumed by travel and waiting in lines, and the convenience of one-stop shopping. The life styles of today's consumers make it difficult to shop on one day at multiple stores. The current rule protects these consumers by enabling them to make informed choices on where to shop and protects businesses by preventing unfair competition through deceptive advertising.

Repealing the Rule would decrease the level of accurate information available to consumers. Bait and switch schemes would become common, and enforcement efforts would suffer. In the end, the consumers would be ultimate losers.

In conclusion, the Rule has served the public effectively and should not be altered. If anything, the Federal Trade Commission should consider expanding the Rule to include other retail businesses and thereby further protect consumers from false and deceptive advertising.

Thank you.

Statement of the American Association of Advertising Agencies

This statement is respectfully submitted by the American Association of Advertising Agencies, Inc. (A.A.A.A.), the national trade association of the advertising agency business. The A.A.A.A.'s purpose in submitting this statement is to propose amendments to the Federal Trade Commission Act which will restrain future abuses by the FTC staff in proscribing and regulating commerical speech.

IDENTIFICATION OF THE ASSOCIATION

The A.A.A.A. includes in its membership approximately 700 advertising agencies with offices throughout the United States and the world. In addition to creating and placing more than 75 percent of all national advertising placed by advertising agencies in this country, A.A.A.A. member agencies also handle a substantial amount of regional, local and retail advertising for goods and services. As specialists in the art of communication, and as members of the public, A.A.A.A. agencies and their employees take an interest in the effects of FTC regulatory initiatives on the ability of advertising information to reach the public at large. The A.A.A.A.'s headquarters address is 666 Third Avenue, New York, New York 10017 and it maintains a Washington Office at 1899 L Street, N.W., Washington, D.C. 20036.

INTRODUCTION

These hearings on FTC Reauthorization are actually the latest round in a process begun four years ago. Since then, the FTC has been forced to move forward each year with only interim provisions for guidance. As a result, a continuing cloud of uncertainty has hung over the Commission, to the detriment of virtually everyone.

We respectfully submit that now, after four years of oversight hearings and countless hours of public testimony and legislative evaluation, the FTC deserves an amended FTC Act that will, once and for all, provide sufficient direction for the Commission and its staff to guide them in proper regulatory duties for years to come.

The A.A.A.A. first testified before this Committee regarding FTC Reauthorization in 1982. At that time, and on several occasions since then, we have come before you with only a few legislative proposals. We have done so not in order to weaken the authority of the Commission to protect consumers from injury due to false, deceptive or misleading advertisements. Nor are we seeking to reduce prompt and effective prosecution by the FTC in appropriate cases. We have consistently asserted that claims or statements that constitute harmful misrepresentations cannot be countenanced in our industry under any circumstances.

In particular, the A.A.A.A. emphasizes that it is not seeking to hinder the FTC's power to require that postive advertising claims be substantiated by factual support such as would satisfy a reasonably prudent person as to their truth. For example, we believe that such positive claims as "get 14 percent better performance" or "9 out of 10 people prefer" clearly represent to the consumer that the advertiser has conducted tests or surveys or has some other basis for making the statements in good faith. That implication is false, i.e., "deceptive," if the advertiser in fact lacks such material, and such misrespresentations should never be permitted.

Insofar as advertising is concerned, we believe that a national regulatory body is needed. But we are acutely aware that the FTC has in the past overstepped the boundaries of its Congressional mandate. Our specific legislative proposals are intended to prevent a recurrence of such overstepping, and to relieve the chilling effect upon freedom of speech that results from it.

We respectfully submit that the time has come to cut through the thousands of words and phrases from special interest groups and to enact those modifications to the FTC Act which have stood the test of scrutiny during these past several years of legislative hearings. As will be set forth more fully herein, we believe our proposals have met that test, and deserve enactment.

ADVERTISING IS SPEECH PROTECTED BY THE FIRST AMENDMENT

The A.A.A.A. is not submitting its proposals as a "special interest." We do not seek a special exemption from any FTC jurisdiction that applies to organizations in general. We are experts in the art of advertising communication, and we offer our thoughts only in that area. We recommend only amendments which would explicitly clarify Congressional intent that the First Amendment, which guarantees everyone freedom from abridgement of commercial speech, shall be conscientiously observed as the Commission goes about its regulatory activites.

Our democracy and our marketplace are grounded upon the conviction that wise decisions are most likely to be made when a broad range of information is disseminated. The First Amendment thus stands to protect the free flow of information. Communication does not take place without a receiver as well as a sender, so the right of all to speak freely implies an equal right on the part of the public to hear those who would speak. Indeed, the freedom to learn, to be fully informed on matters of interest, is as precious an inheritance as the freedom to tell.

Therefore, the guarantees of the First Amendment reach beyond the individual speaker to encompass, as well, the recipient of the communication. As the Supreme Court summarized in a case which invalidated as unconstitutional a Virginia statute prohibiting the advertising of prices of prescription drugs, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976). See Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 390 (1969); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Martin* v. *Struthers*, 319 U.S. 141, 149 (1943). While the persuasive aspect of commercial advertising may be of particular value to sellers of goods or services, the informational content is no less significant to consumers, whose knowledge of product availability would be restricted in the absence of advertising. The public's understanding varies with the quantity and quality of its information. As a consequence, the Supreme Court's decisions involving corporations which have undertaken to communicate with a segment of the public are appropriately based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978) (footnote omitted) (citing cases).

We submit that under constitutional principles commercial speech—advertising—cannot be restricted or proscribed unless a court [1] determines (1) that it is deceptive, or (2) that the restriction directly serves a substantial governmental interest and the restriction does not exceed what is necessary to serve that interest. As the Supreme Court has explained in the context of advertising for professional services,

> Commercial speech doctrine . . . may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. * * * Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas Co.* v. Public Service Comm'n, 447 U.S., at 563-564. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest. *In the Matter of R.M.J.*, 102 S. Ct. 929, at 937-38 (1982) (footnote omitted).

Above all, and this is our overriding interest, non-deceptive advertising is not to be censored because of bureaucratic ideologies as to what is "fair" or "unfair."

The Federal Trade Commission should not have the power to proscribe or restrict truthful, non-deceptive commercial speech as "unfair"

If advertising is to continue to play its vital role in our economy it must be protected from unjustified restraints. Truth and accuracy are concepts which advertisers can and should live with. On the other hand, advertising cannot live with an

---

[1] *See Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Brookhart* v. *Janis*, 344 U.S. 1, at fn. 4, page 4 (1966).

amorphous and ever-changing concept of "unfairness." The characterization is no standard; it can never be defined, for, like beauty, it varies with the eye of the beholder.

We are aware that members of the Commission, and others, have in the past proposed statutory language with respect to "unfair . . . acts or practices" that they believe could provide guidance for the Commission and thereby ensure responsible Commission management. While we respect their concern, and we agree with their recognition that the present statutory language is unacceptable, we believe that no attempt to define the word "unfair" could be sufficient to satisfy First Amendment requirements.

For example, the three-part specification for "unfair acts or practices" [2] that has been included in some legislative proposals throughout the past few years is asserted by some to be sufficient to foster proper regulatory observance and preclude administrative overreaching in the area of constitutional governance. Unfortunately for all of us, that is not the case.

Determinations in given instances of what is consumer "injury" and whether it is "substantial"; whether it can "reasonably" be "avoided" by consumers; or whether the act or practice is devoid of "offsetting benefits" of whatever nature, are all such subjectively laden value judgments that they would leave the Commission (or, more intolerably, even a majority of two unelected Commissioners out of a quorum of three) with no less absolute a discretion than it possesses now with the amorphous and unbounded term "unfair." After all, the prescriptions of "substantial" and "unavoidable" injury without "offsetting benefits" mirror those set forth in the Commission's letter to Senators Ford and Danforth dated December 17, 1980, and appear to be essentially the same considerations asserted by the Commission to have been satisfied in the notorious Children's Advertising Proceeding.[3]

In our view, the mandate of the First Amendment requires a more inclusive protection for commercial advertising. We have proposed in the past, and we propose today that the FTC Act be amended to provide that the term "unfair . . . acts or practices" should not be employed to restrict the content of commercial advertising.

We have two basic reasons for recognizing this constitutionally dictated protection for commercial advertising. The first reason, as explained above, is that advertising, unlike most other acts or practices within the FTC's jurisdiction, is a form of speech protected by the First Amendment to our Constitution. The second reason is that it is needed to preclude the types of abuses which have taken place in the past.

While this Committee is well aware of the abuse heaped upon advertising by the Commission in past years we feel obliged, once again, to remind you of a few of them. The most obvious is the Children's Television Rulemaking effort, which was brought to an end as the result of Congressional action. In the words of the then Chairman of the Commission, that rulemaking proceeding was premised on the concept that "children's advertising is inherently unfair." The remedies which the Commission would have impressed to correct this alleged unfairness would have, among other things, banned all television advertising of all products to young children (probably under age 8) and would have banned the advertising of sugared products to older children (probably under age 13). If that rule had gone into effect, it would have been unlawful to advertise baseball gloves, toys, cereal or any other product on, at least, Saturday morning television. Presumably one could not have advertised candy on any television program in which children made up a sizable percentage of the audience.

Several other trade regulation rulemaking proceedings have involved application of the unfairness doctrine to advertising. One of these proceedings, initiated November 11, 1975 (40 Fed. Reg. 52631), proposed a rule which would have made it unlawful to make an advertising claim for any over-the-counter drug which the Commissioner of Food and Drugs had determined could not be made in labeling the drug. If that rule had issued, it would have been "unlawful" to truthfully advertise an effective analgesic as useful for backache, or muscular aches and pains, if the FDA-man-

---

[2] "[T]he Commission may exercise its 'unfairness' jurisdiction only when: (1) an act or practice causes substantial injury to consumers; (2) the injury cannot reasonably be avoided by consumers; and (3) the act or practice has no off-setting benefits."

[3] One Commentator has noted, in regard to the "standards" set forth in the Commission's letter of December 17, 1980, that [i]n considering criteria for determining whether an act or practice is unfair, one difficulty with the current standards for defining "unfair" acts or practices is that they are based on a "value," rather than a "factual," foundation, with the result that the Commission, by applying its own values, has virtually unlimited discretion and may take actions that appear purely arbitrary. Denger, *The Unfairness Standard and FTC Rulemaking: The Controversy Over the Scope of The Commission's Authority*, 49 Antitrust Law Journal 53, 84 (Summer, 1980 Part I).

dated label did not state these uses in exactly those words. Truthful advertising, completely devoid of deception, would have been suppressed.

We could point out other examples of abuses. However, to do so would merely burden the record, for it seems unlikely that any reasonable person would dispute the fact that the Commission or its staff have on numerous occasions used the unfairness doctrine in an abusive fashion.

The A.A.A.A. believes, further, that it is necessary that Congress ban FTC resort to the unfairness doctrine across the board for advertising content, i.e., in both rulemaking and adjudications. Why? Because any act or practice the Commission might attempt to regulate by rulemaking it might also attempt to regulate by means of case-by-case adjudications. If unfairness remains for advertising adjudication, a future Commission might decide to bring individual cases against advertisers based on the same "unfairness" theories which produced the aborted over-the-counter drugs, children's television advertising, and food advertising rules. The advertisers subject to such innovative and ideologically generated orders to cease and desist would be at a competitive disadvantage versus other sellers not subject to such orders.

The threat of a possible "unfairness" charge operates as a chilling prior restraint on inventiveness and innovation in advertising. Advertising is an art form; it must motivate and persuade or its cost constitutes simply an economic burden. It must be permitted the freedom to do its legitimate job.

The Committee should think also of the economic costs which the FTC's pursuit of the unfairness doctrine imposes upon the consuming public. It is wrong to assume that no harm is done when the FTC goes off on one of its unfairness escapades but subsequently decides to abort the effort. Someone has to pay for that exercise, and in the final analysis it is the taxpayer and the consumer.

Since advertising is speech protected by the first amendment, the Federal Trade Commission's authority to regulate or proscribe allegedly "deceptive" advertising must be clarified

We respect the past suggestions of those, including FTC Chairman Miller, who say that the FTC Act should include an explicit definition of what constitutes a "deceptive act or practice" in the realm of commercial speech. The need for such a definition has been pointed out by Professor Rosden in his treatise, The Law of Advertising: It has been said sometimes, and not without a measure of truth, that an advertisement is deceptive if the Federal Trade Commission calls it so. Section 18.03, pp. 18–46. The Commission should not be left unbridled and thus able to ignore the Congressional mandate that regulatory activity be in the public interest.

Our comments to this Committee in past years proposed a statutory formulation of "deception" for the FTC Act. Since we last testified, the Commission itself has issued a Policy Statement attempting to clarify FTC standards under the "deceptive acts" jurisdiction.[4] The A.A.A.A. believes that the perceived need for such a document points up the benefits of clarifying applicable standards in the area. We believe that a statutory definition would similarly promote clarity. However, let us emphasize at the outset that we are not wedded to any particular words, provided that whatever articulation might be chosen achieves our fundamental purposes. In this matter our principles are our objectives.

From its enactment, the Federal Trade Commission Act has unequivocally reflected a Congressional intent that public and private resources not be wasted on regulatory activities that do not serve the public interest. *E.g.*, FTCA § 5(b), 15 U.S.C. § 45(b). As the Supreme Court made clear in *FTC* v. *Klesner*, 280 U.S. 19, 18 (1929): "To justify filing a complaint the public interest must be specific and substantial." The Commission and the courts must give more than lip service to the concept that the Federal government should avoid pursuit of trivia and concentrate on matters which are material consequences of intentional or reckless behavior, or which otherwise unlawfully harm consumers significantly.

In an attempt to provide a particular statutory formulation that we believe will satisfy our principles, we stand ready to work with this Committee and interested parties in an attempt to amend the FTC Act to provide some definitional guidance.

We offer our suggestions in an attempt to assist this Committee in exploring concerns of principle that have been raised about these aspects of the Commission's authority. We believe that the statute should provide a definition of Commission authority sufficient to help clarify constitutional reguirements and Congressional purposes that must govern responsible regulation of advertising. At bottom, however,

---

[4] FTC Policy Statement on Deceptive Acts and Practices, October 14, 1983 (Letter to the Honorable John D. Dingell from Chairman James C. Miller).

our concern remains not with carved-in-granite verbiage but with the principles we explain today and have set forth in prior statements to this Committee.

The advertising industry has always believed that advertising known to be false or recklessly unsubstantiated should not be countenanced by the Commission regardless of its lack of injurious impact on consumers. As we have stated on previous occasions, and we reiterate today, an advertiser and its agency must ensure that positive claims made in their advertisements are substantiated by and based upon support such as would satisfy a reasonably prudent advertiser as to their truth. Failure to meet that standard of conduct, in our view, constitutes unacceptable behavior.

The Commission should not have the power to employ back door rulemaking

The A.A.A.A. believes that Section 5(m)(1)(B) of the Federal Trade Commission Act should be repealed. This provision purports to authorize the Commission to bring enforcement proceedings in district courts against advertisers who violate cease and desist orders obtained in adjudicative proceedings in which they were not parties. We believe that such a procedure constitutes "back door rulemaking."

As we see it, the Commission could someday decide to forego rulemaking under Section 18 of the Act since it has this even handier loophole by which to force its will upon an entire industry.

The rulemaking safeguards of the Magnuson-Moss Act were imposed to ensure that the affected industry had an opportunity to defend itself. As the drafters of the procedural safeguards put it: Because of the potentially pervasive and deep effects of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the Committee believes greater procedural safeguards [than mere notice and comment] are necessary.[5]

If even the actual giving of notice and an opportunity to file comments in a rulemaking proceeding were deemed inadequate, it seems obvious that the complete absence of these opportunities sanctioned by Section 5(m)(1)(B) is intolerable.

The Senate Report on S. 1991[6] noted that Congress "is aware that a potential ambiguity may be presented to the Commission with respect to its enforcement authority under Section 5(m)." We submit that any review of that ambiguity must have only one result: the repeal of Section 5(m)(1)(B).

CONCLUSION

We greatly appreciate this opportunity to present our views on these important subjects. For four years we have put forth these suggestions for the FTC Act, and we continue to believe that they are in the best interests of our nation. We look forward to their enactment.

STATEMENT OF SUSAN G. BRADEN, CHAIRMAN OF THE ANTITRUST LAW AND FEDERAL TRADE REGULATION SECTION OF THE FEDERAL BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am Susan Gertrude Braden, Chairman of the Antitrust Law and Federal Trade Regulation Section of the Federal Bar Association.[1] I am appearing today on behalf of the over 15,000 members of the Federal Bar Association, who are located throughout the country and overseas.[2]

The Federal Bar Association appreciates the opportunity to participate in these important reauthorization hearings concerning the Federal Trade Commission and to provide you with our views concerning the Commission's jurisdiction over unfair or deceptive acts and practices thay may be engaged in by professionals.

---

[5] H. Rep. No. 93-1107, 93rd Cong., 2d Sess., May 17, 1973, p. 45.

[6] S. Rep. No. 96-500, 96th Cong., 1st Sess., Dec. 14, 1979, p. 18.

[1] I am a partner in the Washington office of Porter, Wright, Morris & Arthur, an Ohio-based law firm.

[2] The Federal Bar Association was organized in 1920 and has grown to become the leading professional organization representing civilian and military attorneys in federal service. The Association number over 15,000 attorneys employed in every department and agency of the federal government, the federal bench, hundreds of law firms, law schools and universities, corporations, trade associations, unions and many other private organizations. The Federal Bar Association conducts its activities through 80 substantive law committees and more than 100 Chapters across the nation and overseas.

As reflected in Resolution 84-1, passed by its National Council[3] on November 19, 1983 (and attached to this Statement), the Federal Bar Association opposes enactment of legislation that would exempt professionals from the consumer protection jurisdiction of the Federal Trade Commisson Act.

I would like to focus your attention to two brief points, but ones that go to the heart of the debate you have heard today.

First, those who seek exemption from Section 5 have not demonstrated that the Federal Trade Commission has exceeded its consumer protection jurisdiction over professionals in the past or that there is any reasonable likelihood that it may do so in the future. They have not done so because the Commission enforcement activity has been well within the parameters of the law. Moreover, the Commission's 1980 Policy Statement concerning unfair acts or practices[4] coupled with its 1983 Policy Statement concerning its authority over deceptive acts or practices[5] provide very clear guidance as to the parameters of Section 5. In addition, the Commission appropriately has recognized the legitimate role of professional associations and the States in establishing training and educational requirements for licensure of professionals, the scope of professional activity and the quality of service rendered by professionals.

Second, the proponents of changing the status quo, have made no showing as to how the public interest will be served by exempting professionals from the consumer protection provisions of Section 5 of the Federal Trade Commission Act. Quite simply, they have not done so because the public will not be served by this exemption.

As you know, the American Bar Association's House of Delegates endorsed a Resolution at this Annual Meeting in August 1983 that would strip the Commission of its Section 5 Jurisdiction ovr the legal profession. Shortly thereafter, the Antitrust Law and Trade Regulation Section of the Federal Bar Association passed a resolution opposing this action and brought this matter to the attention of the National Council of the Federal Bar Association. After an extensive debate, the National Council approved "Resolution 84-1 Opposing Exemption of Professionals from FTC Jurisdiction," on November 19, 1983, and communicated its views to the Congress, the Administration and other individuals that had an interest in this important matter.[6]

In the past nineteen months, the Federal Bar Association has been extensively lobbied by the American Bar Association leadership and members of the Texas State bar to retreat from its position. In the interest of fairness, the Antitrust and Trade Regulation Section revisited this issue last winter when members of the American Bar Association and the Texas delegation were invited to appear before the Section's Council. The merits of this issue were debated at great length. The Section's Council, however, voted unanimously to recommend that the Federal Bar Association continue to support the Federal Trade Commission in the efforts to retain its consumer protection jurisdiction over professionals. That remains our position today.

Let me close by making the following observation. The Federal Bar Association's action was prompted, in large part, by a deep concern that the American Bar Association's action would be widely perceived by the public as an attempt by the legal profession to secure special privileges. We felt it was important to take a stand to show that we, as lawyers sworn to enforce and uphold the laws of the United States, believe in one set of laws for all citizens. We urge the Committee to resist the pressures of those who represent a narrow and self-serving view within our profession and retain the Federal Trade Commission's consumer protection jurisdiction over professionals.

Thank you for the opportunity to share our views with you.

---

[3] The Federal Bar Association acts through its National Council (similar to the American Bar Association's House of Delegates), which is comprised of national elected officers, past presidents, chapter delegates from across the country, Section chairpersons and appointed members.

[4] (1) A act or practice shall be considered an "unfair act or practice" if (i) it "causes or is likely to cause substantial injury to consumers," (ii) such injury is "not reasonably avoidable by consumers," and (iii) such injury is "not outweighted by countervailing benefits to consumers or to competition which results from such act or practice."

[5] Before an act or practice will be found to be "deceptive": (i) it must be a representation, ommission or practice that is likely to mislead the consumer; (ii) the consumer must be shown to be acting reasonably in the circumstances; and (iii) the representation, omission or practice must be one that is "material."

[6] See December 20, 1983, letter to former Chairman Bob Packwood, Committee on Commerce, Science and Transportation.

STATEMENT OF THE AMERICAN OPTOMETRIC ASSOCIATION

The American Optometric Association appreciates the opportunity to comment on the reauthorization of the Federal Trade Commission. AOA is the national organization representing some 24,000 doctors of optometry, optometry students and educators. Our comments will focus on the continuing question of FTC activities relating to state regulated professions.

It has been the consistent position of the AOA that the Commission lacks the authority to preempt state health care laws and should not be granted such broad authority by the Congress. That position is grounded in part in a firm belief in the right of the states to provide legislation protecting the health, safety and welfare of their citizens and a confidence in the legislatures of the individual states to determine what legislation is necessary and desirable to protect consumers and promote quality care.

The regulation of health and vision care, as well as other professional services, is an area where the states have a traditional and fundamental interest. It is an area which involves more than economic considerations, for it directly implicates the vital interest of public health and the total well-being of the consumer.

Acting pursuant to their respective police powers, all States supervise and regulate the delivery of vision care to their citizens by optometrists and physicians. State laws have been adopted as part of the regulatory patterns designed to meet local conditions and thereby protect the public health and welfare.

The whole history of the subject of State regulation in the health care field establishes and vindicates the authority of the States to legislate comprehensively in this field in accordance with relevant constitutional limitations. Such legislation is subject to judicial review, and state laws in this area have been unheld on all levels of the court system—both State and Federal.

In trying to come to grips with this issue during the last Congress, the Subcommittee developed language which serves to confuse rather than clarify the issue of FTC authority. The AOA strongly recommends that the professions provision contained in S. 1714 of the 98th Congress not be considered for inclusion in any proposed legislation this session. The ambiguous nature of this language raises basic and important questions that have stalemated final consideration of this issue for nearly four years.

It has been suggested by some that no professions language is needed in the FTC authorization bill or that the Congress should expressly make it clear that the time honored state action doctrine should apply to the Commission's "unfair or deceptive acts or practices" authority. Certainly these approaches would be far better than a return to the language contained in S. 1714. Application of the state action doctrine seems an especially logical and wise approach to a meaningful resolution of this matter. It is entirely reasonable to expressuly clarify that the state action doctrine, based as it is on the concept of federalism, is equally applicable to both the Commission's antitrust and unfair or deceptive practices authority.

The American Optometric Association continues to stand at the forefront of providing for the visual welfare of our nation. It has encouraged measures which will protect and aid the citizens of our country and opposed those which would not. As Senator Rudman stated during debate on this issue in the 97th Congress, the issue for America's doctors of optometry is a legitimate concern for state jurisdiction and quality of health care.

We thank the Subcommittee for this opportunity to present our views.

STATEMENT OF KAREN LEICHTNAM, LEGISLATIVE ASSISTANT, HALT, AMERICANS FOR LEGAL REFORM

HALT is the nation's largest public-interest consumer advocacy legal reform organization, dedicated to reducing the cost and improving the quality of legal services in America. HALT and its 160,000 members throughout the country strongly oppose any profession's exemption from the Federal Trade Commission's mission to regulate "unfair or deceptive" trade practices.

Members of the legal profession who support such an exemption claim that the state courts have traditionally and adequately regulated their profession. For this reason, they argue, the Federal Trade Commission has no business interfering in the state courts' right to oversee the practice of law.

There is, however, an alternative view: that of the legal consumer.

If you are one of the 5,000 legal clients in California who filed a complaint with the state bar against your lawyer in 1983 and had your case closed without any

formal investigation, you may doubt how well that state court, through the bar association, is policing the practices of your state's lawyers.

Recently, in that state, a lawyer who had been punished three times for improperly withholding a client's money was recommended for disbarment by the state bar association following his fourth offense. The state Supreme Court refused to disbar the lawyer, claiming that such action would be "overly harsh." His clients probably have some doubts about the state court's effectiveness in governing the business practices of lawyers.

If you are a Florida resident who filed one of the 4,500 complaints against lawyers that we dismissed in 1982-83, you may wonder how well your state courts are protecting you from unfair or deception practices.

If you are a former court reporter and legal secretary who was accused by your state's bar association of practcing law without a license (for the crime of helping poor people fill out simple legal forms), and if you were tried by the lawyers on your state's supreme court and sentenced by them to serve time in jail for your "offense," you might wonder just whom the state court is protecting—the legal services consumer or the legal profession.

If you are a lawyer in Ohio who printed newspaper ads informing women of legal rights they did not know they had, and you were brought before the bar association and reprimanded for giving unsolicited legal advice, you might wonder if your state bar association wasn't really just trying to keep you from advertising at all, at the expense of the consumer's right to know.

In testimony before the House Banking, Finance and Urban Affairs Committee last year, a representative of the American Collectors Association related a pertienet illustration of one state bar's perception of its role in consumer protection. When one of six public members of the California State Bar's Board of Governors proposed that the Board publish a pamphlet explaining to the public how to complain about an attorney, a member of the Board rose from his seat, slapped his hand on the table and said, "The State Bar is not a consumer complaint agency."

If this is the attitude of the state bar association, which is empowered through the state Supreme Court to handle lawyer grievance matters, it is clear that the state court is not an adequate substitute for the FTC in matters of consumer protection.

While we recognize that the FTC's jurisdiction does not extend to all of the issues we have cited, these are eloquent examples of why the legal profession should not be allowed to regulate itself, whether directly through the state bar associations or indirectly through the state courts. Reaffirmation of the FTC's jurisdiction over lawyers' business practices is only a small step on the way to reforming the legal profession through outside regulation. State courts cannot be relied upon to provide objective regulation of a profession that functions as a branch of the court itself. Indeed, at their best the courts serve only as rubber stamps to bar association recommendations. Too often, as we have seen, they even find those bar recommendations "overly harsh."

Because most state bar associations are integrated as extensions of state supreme courts for matters of lawyer regulation, the potential for conflict-of-interest is enormous. No profession can regulate itself adequately, as though it had no regard for its own economic self-interest.

The FTC has jurisdiction over other professions which are also governed by state laws and, so far as we have heard, the legal profession has had no objection to that. It is only when the agency seeks to act on its authority over lawyers that a great hue and cry is raised and the hallowed doctrine of "state and action" is invoked.

The legal profession has enjoyed an unfair position in the marketplace for too long. At a time when many lawyers across the country are ardently defending the consumer's right to full knowledge about the goods and services they purchase, members of that profession are striving to exempt themselves from any strictures that would require them to give their own clients the same knowledge and protection.

We believe that the FTC should fully retain its current jurisdiction over the professions' business and commercial acts and practices. Further, it should pursure that jurisdiction more aggressively than it has in the past. To achieve this, the reauthorizing legislation should assign to the Commission specific authority over "unfair or deceptive" practices in all professions, without exception. It is wholly inappropriate for members of the legal profession to ask to be held above the laws that govern all others.

STATEMENT OF THE NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS

Mr. Chairman and members of the Consumer Subcommittee, the National Association of Federal Credit Unions (NAFCU) appreciates this opportunity to make a statement for the record as you consider reauthorization of the Federal Trade Commission (FTC). As the only national trade association which exclusively represents the interests of credit unions chartered by the federal government, the National Association of Federal Credit Unions has long advocated exempting Federal credit unions from the direct jurisdiction of the Federal Trade Commission in a manner similar to that afforded to commercial banks since 1914 and savings and loan associations since 1979.

I respectfully request that this statement be included in the official hearing record of your subcommittee as you review matters relating to the reauthorization of the Federal Trade Commission.

When the Federal Trade Commission Act was enacted in 1914, banks were specifically exempted from the direct regulatory and investigative authorities of the newly-created Commission because they were already regulated by the Federal Reserve Board. Savings and loan associations were granted a parallel exemption in July 1979, by the enactment of Public Law 96-37. Today, Federal credit unions are the only type of federally chartered depository institution directly regulated by the Federal Trade Commission.

As you and your colleagues in the Congress consider legislation to reauthorize the Federal Trade Commission, we respectfully request that you support inclusion in that legislation of an exemption for Federal credit unions from direct Federal Trade Commission jurisdiction. Thanks to the able assistance of the Chairman of this Subcommittee, Senator Kasten, and others on this subcommittee, such an exemption was favorably reported by the Senate Commerce Committee in both the 97th Congress and the 98th Congress. Attached to this statement is the pertinent language from the Federal Trade Commission reauthorization bill approved by the Senate Commerce Committee in the last Congress. (Section 11 of S. 1714.)

The precedent for exempting Federal credit unions from direct Federal Trade Commission jurisdiction is well established. In addition, such an exemption would eliminate unnecessary, costly, and duplicative regulation of Federal credit unions, which is stated objective of the Financial Regulation Simplification Act of 1980 (Title VIII, Public Law 96-221). NAFCU suggests that the National Credit Union Administration, which is the independent agency of the federal government with primary responsibility for the chartering, regulation, supervision, and examination of Federal credit unions, should regulate Federal credit unions with respect to consumer protection matters and most areas of antitrust, rather than the FTC.

REGULATORS SUPPORT EXEMPTING FEDERAL CREDIT UNIONS FROM FTC JURISDICTION

Regarding the proposal to exempt Federal credit unions from FTC jurisdiction, the Honorable Lawrence Connell, then Chairman of the National Credit Union Administration Board, stated in testimony before the Senate Committee on Banking, Housing and Urban Affairs in May of 1981:

Section 18(f)(1) of the Federal Trade Commission Act provides that the Federal Reserve Board has the authority to promulgate similar regulations for banks when the FTC issues a Trade Regulation Rule affecting banking or finance areas. The Federal Home Loan Bank Board was provided similar authority for savings and loan associations. We ask the Committee to consider granting the same authority to NCUA, so that Federal credit unions and their members will have the benefit of trade regulations that have been carefully considered by their supervisory agency.

When requested to present the views of the Federal Trade Commission on this suggestion, Ms. Linda Colvard Dorian, then the Deputy Director of the FTC's Bureau of Competition, commented on August 25, 1981:

The Commission supports a provision similar to that contained on Section 18(f) of the Federal Trade Commission Act, giving the National Credit Union Administration authority to issue trade regulation rules prohibiting unfair or deceptive practices by federally-insured credit unions. The same reasoning which led the Congress to adopt this approach for savings and loan institutions insured by the Federal Home Loan Bank Board in Public Law 96-37 appears applicable to credit unions.

On April 6, 1982, the present Chairman of the National Credit Union Administration Board, Edgar F. Callahan, wrote: . . . concerning NAFCU's efforts in exploring the possibility of exempting Federal credit unions from the jurisdiction of the Federal Trade Commission. . . . I am very supportive of efforts to eliminate such duplicative regulations and can state that this agency is prepared to ensure proper compli-

ance in such matters. Therefore, I certainly would encourage your continued efforts in obtaining amendatory language to the Federal Trade Commission Act. . . .

On February 4, 1985, NCUA Board Chairman Callahan reiterated his firm support for such a change in the law when he wrote: . . . I continue to be very supportive of efforts to eliminate duplicative jurisdiction such as those subjecting credit unions to both FTC and NCUA regulation. Therefore, I strongly endorse enanctment of legislation to grant credit unions the same exemption from the FTC already enjoyed by both banks and savings and loans.

On May 28, 1982, the full Commerce Committee reported the "Federal Trade Commission Amendments Act of 1982" (S. 2499). Section 15 of S. 2499, if enacted into law, would have provided Federal credit unions with an exemption from direct Federal Trade Commission jurisdiction parallel to that enjoyed by commercial banks and savings and loan associations. While final consideration of S. 2499 was deferred because of concerns unrelated to the Federal credit union exemption, Federal Trade Commission Chairman, James C. Miller III, in testimony on March 16, 1983, noted that: . . . since other financial institutions which are subject to the primary jurisdiction of other federal agencies have been removed from Commission jurisdiction, a majority of the Commission feels that it would be consistent to place credit unions which are regulated by the National Credit Union Administration, on the same footing.

On August 2, 1982, the Commerce Committee reported S. 1714, the "Federal Trade Commission Act Amendments of 1983." As mentioned in our introductory comments, Congressional enactment of the language contained in Section 11 of that measure would achieve the parity of treatment endorsed by both the federal regulators and those subject to their regulation.

Last week, Chairman Miller reaffirmed the Federal Trade Commission's position on this issue when, in testimony before the House Energy and Commerce Subcommittee, the subcommittee having jurisdiction over the Commission's reauthorization, he reiterated that the majority of the Commissioners have no objection to such a change in the law.

CREDIT UNION MEMBERS SHARE A COMMON BOND

NAFCU would point out that Federal credit unions, unlike other types of regulated depository institutions, are prohibited by statute from serving the general public (12 U.S.C. § 1759). Every Federal credit union's charter spells out quite clearly the "field of membership" for that particular credit union. Every individual falling within a credit union's "field of membership" must share a "common bond" with other potential members. Each credit union's common bond will differ, but, in every instance, it will be defined by either occupation, association, or a well-defined geographical boundary. For example, mere residency in the District of Columbia does not entitle a person to become a member of the Senate Employees Federal Credit Union. To become a member of the Senate Employees Federal Credit Union, an individual must either be an elected member of the United States Senate or work in the Senate.

Occasional questions have been raised concerning possible antitrust implications of Federal credit union mergers. The fact that Federal credit unions, by statute, are prohibited from serving the general public has led to an increased level of Federal credit union merger activity in recent years. During a recessionary period, one can anticipate an increased level of Federal credit union merger activity, since many Federal credit unions are composed of individuals who are employed by a common employer. When corporations confronted by economic realities seek merger partners, it is not uncommon for the Federal credit unions which serve the employees of the respective corporations to be merged as well. Such a merger preserves the integrity of all the parties involved.

For purposes of illustration, assume that a Constitutional amendment were passed which would abolish our present bicameral form of government and replace it with a unicameral form of government. At present, both the Senate and the House of Representatives have credit unions which meet the needs of the members and stafff of the two respective chambers. Should the bicameral form of government be abolished, it would simply make sense to merge the two credit unions which presently serve the two chambers, rather than go through the expense and administrative nightmare of liquidating one in order that the members might join the other. These types of mergers occur with some regularity, tracking the corporate mergers of sponsoring businesses. In every instance, they are done subject to review by and the approval of the National Credit Union Administration, an independent agency of the federal government.

NUMBER OF CREDIT UNION MERGERS: 1973–1984

During the twelve-year period extending from 1973 to 1984, there were on an average 311 credit union mergers per year which were conducted under the supervision of the National Credit Union Administration. As is the case with all regulated depository institutions, the volume of merger activity has increased somewhat in recent years, as indicated below:

Year	*Number of mergers*
1984	642
1983	706
1982	633
1981	333
1980	313
1979	193
1978	196
1977	195
1976	198
1975	196
1974	76
1973	54

Most credit unions mergers are voluntary. In fact, 86 per cent of credit union mergers in 1984 and 74 per cent over the last four years have been voluntary. A voluntary merger makes sense when a credit union has recently lost all or part of its field of membership or is no longer economically viable.

INTEGRITY OF CREDIT UNION MERGERS

Officials of the Executive Office of the Antitrust Division of the Department of Justice, as well as those with the Office of General Counsel of the National Credit Union Administration, report that despite the substantial level of credit unions merger activity in recent years, there is not a single reported case of any federal agency ever challenging a credit union merger on antitrust grounds. This is a commendable record, of which the National Credit Union Administration should be justifiably proud.

RETENTION OF JUSTICE DEPARTMENT JURISDICTION

There is nothing in this proposal which would alter the authority of the Justice Department to bring a cause of action in the event that the Department wishes to challenge a Federal credit union merger at any future date, should the exemption be enacted into law. In addition, officials of the Executive Office of the Antitrust Division of the Department of Justice indicate that just as the Department retained jurisdiction over savings and loan associations following the enactment of Public Law 96-37, so would the Justice Department retain similar jurisdiction over Federal credit unions should a parallel Federal Credit union exemption be enacted into law. Indicative of NCUA's effort and concern in this area is the fact that the Justice Department views are obtained whenever deeemed desirable.

It is our understanding that whenever the National Credit Union Administration considers the approval of credit union mergers, NCUA requires staff consideration of the economic impact and legality of a proposed merger as a precondition to consideration for approval. The National Credit Union Administration for years has reviewed merger applications in light of the antitrust laws and ensured compliance with those statutes in order to obtain approval of a merger application.

CONCLUSION

Mr. Chairman, NAFCU would once again ask that you and your colleagues view favorably language similar to that contained in Section 15 of the "Federal Trade Commission Act Amendements of 1982" (S. 2499) and Section 11 of the "Federal Trade Commission Act Amendments of 1983" (S. 1714) exempting Federal credit unions from the direct jurisdiction of the Federal Trade Commission (FTC). As the record clearly indicates, Federal credit union mergers have historically been administered in a highly responsible manner.

Congressional enactment of such an exemption would also conform to the findings contained in Title VIII of Public Law 96-221:

The Congress hereby finds that many regulations issued . . . often impose costly, duplicative and unnecessary burdens on both financial institutions and consumers. . . . Regulations should achieve legislative goals effectively and efficiently. Regula-

tions should not impose unnecessary costs and paperwork burdens on the economy, on financial institutions, or on consumers.

The National Credit Union Administration is required by the Federal Credit Union Act to regulate Federal credit unions. It must supervise the Federal credit union community comprehensively, intensely, and continuously. It must, and does, exercise its powers in plenary fashion for the protection of the member-owners of credit unions. While the interest and efforts of the FTC in preventing or eliminating unfair trade practices are to be encouraged, at the same time the resources of the National Credit Union Administration may be used more effectively than those of the FTC in the very area where NCUA has special expertise and is in a particularly effective position to make a contribution.

NAFCU, therefore, urges you and your colleagues in the Congress to provide Federal credit unions with a parallel exemption from the direct jurisdiction of the Federal Trade Commission similar to that presently granted to commercial banks and savings and loan associations. To do otherwise would perpetuate inefficiencies in government regulation of the financial marketplace.

STATEMENT OF THE OPTICIANS ASSOCIATION OF AMERICA

Mr. Chairman and members of the Subcommittee: I am James D. Hawkins, Executive Director of the Opticians Associations of America (OAA). OAA is a national association of retail optical firms, state opticians associations, and individual dispensing opticians. Our members include large national chains as well as small firms.

It has been our association's privilege to appear before this Subcommittee during previous sessions of Congress on the FTC reauthorization issue. In the interest of time, I would like to summarize the position of the Opticians Association of America relative to the FTC Reauthorization issue as follows:

1. OAA supports the reauthorization of the FTC.

2. OAA opposes provisions that would grant professionals and associations of professionals immunity from law enforcement that others do not enjoy.

3. We oppose expansion of the "state action doctrine" to include consumer protection activities of the FTC. This is because we feel it is essential that the FTC retain jurisdiction over unwarranted restrictions on competition such as those enacted by state optometric boards in the guise of public health and welfare measures.

4. If Congress decides to include a legislative veto of FTC actions in its reauthorization bill, OAA favors the "Report and Wait" alternative over a requirement that FTC rules would have to be authorized by the House, Senate and President before taking effect.

OAA urges the Congress to reauthorize the Federal Trade Commission. The FTC's investigatory and enforcement initiatives in the optical industry have helped to promote increased competition among providers of ophthalmic goods and services as well as to protect consumers from unfairness and deception. These initiatives are in the public's best interest and should be allowed to continue.

As a result of an extended investigation of public and private restrictions on ophthalmic advertising, for example, the FTC issued the Eyeglasses I Trade Regulation Rule in 1978. One very important provision of this rule mandated the release of prescriptions by eye doctors to consumers, thereby ensuring their freedom to obtain prescribed eyewear from providers of their own chosing.

The Eyeglasses I rule increased competition among ophthalmologists, optometrists and opticians. It has helped to reduce the retail price of eyeglasses and contact lenses in many jurisdictions. Without the FTC's prescription release requirement, optometrists and those ophthalmologists who sell what they prescribe can easily deprive consumers of the opportunity to purchase prescribed eyewear from other sellers of ophthalmic goods and services, including dispensing opticians.

We are pleased to note that the American Medical Association has changed its position and no longer seeks exemption language in the reauthorization bill. In light of this, we urge the Senate not to adopt language addressing the question of FTC jurisdiction over the professions. We do not agree with the AMA interpretation of recent Supreme Court decisions dealing with the "state action doctrine." But, we do agree with AMA that the courts should be relied upon to provide guidance regarding future FTC actions relating to the prescription eyewear market.

In August 1984, the Court of Appeals of Maryland, the highest court in that state, ruled that opticians in that state do have the right to fit contact lenses if they do so on a prescription marked "o.k. for contacts" and if they refer the patient back to

the prescriber after the fitting process has been completed. As a result of this decision, the legal right of opticians to fit contact lenses in Maryland has been clarified.

Similarly, in the State of Wisconsin earlier this year, the Wisconsin Optometry Examining Board tried to get the District Attorney in Milwaukee County to prosecute an optician for the unlicensed practice of optometry because he fit contact lenses. Wisconsin is one of several states where the law has been interpreted differently by opticians and optometrists as to whether opticians can provide this service. In what surely must have been a surprise to the Optometry Board, the District Attorney's office issued an opinion that the present case law and Wisconsin statutes do not preclude opticians from fitting contact lenses.

While we applaud both the Maryland and the Wisconsin official actions, we are concerned that organized optometry in those and other states will use their considerable influence, including the police power of their profession's state licensing boards, to pass rules, regulations and to seek legislation that would, in the words of your own Committee Report, "effectively suspend a function which has been performed successfully by (opticians) for years." We believe it is good public policy for the FTC to retain jurisdiction over such business and commercial practices.

We are not alone when we point to the desirability of having the FTC continue its role in fostering competition in the prescription eyewear marketplace. This point was made in the recent report of your own Office of Technology Assessment:

"Any forthcoming FTC action in this area, particularly in regard to franchising and to the State laws that define the permissible limits of opticians in the fitting of contact lenses, will exert great influence on the extent and forms of competition among all classes of practitioners, with strong implications for future price structures and trends."

Health Technology Case Study 31: *The Contact Lens Industry, Structure, Competition and Public Policy*, Office of Technology Assessment, U.S. Cong., December 1984, p. 41

Our final comment expands on the point we made relating to the interest expressed by the Congress in having a form of legislative veto over FTC rules. If such a provision is considered essential by the Congress, OAA urges that some form of legislative veto, such as a "Report and Wait" mechanism be incorporated in the reauthorization measure rather than any requirement that FTC rules require affirmative action by the House and the Senate as well as the President before taking effect. A requirement such as the latter would turn the FTC into just a "think tank" offering suggested remedies to the Congress and would severely limit the ability of consumers and providers such as opticians to benefit from any remedies that might flow from FTC rules. We favor a more aggressive involvement of the Federal Government in eliminating restrictions on competition in the delivery of health care and related products and services. To restrict Federal action in this area to the Congress would be like taking the cop off the beat in this crucial precinct.

We feel the FTC has been more than cautious of late in making certain it does not overstep its bounds in the rulemaking areas. If anything, we think it has been too timid in the area of contact lenses. As you may know, the Eyeglasses II Proposed Rule currently under consideration by the Commission, is silent with regard to the issue of eliminating state restrictions on the rights of opticians to duplicate lenses and fit contact lenses. While OAA fully supports the remaining portions of the Eyeglasses II Proposed Rulemaking, we are urging the Agency to conduct separate hearings on the issues relating to contact lens fitting by opticians. We urge the Congress to provide the FTC with an authorization bill that will encourage the Agency to continue its important work in this and related areas.

Thank you for this opportunity of providing the views of the Opticians Association of America on this issue.

STATEMENT OF WILLIS B. GOLDBECK, PRESIDENT, WASHINGTON BUSINESS GROUP ON HEALTH

My name is Willis Goldbeck, President of the Washington Business Group on Health, the only national organization devoted exclusively to the health policy interest of major employers.

For the past three years we have been in the uncommon position of appearing before Congress in defense of the FTC's authority. Today, we are here to reaffirm our basic position: Congress should reauthorize the FTC and do absolutely nothing to weaken its authority over the professions.

When those who advocate the FTC treating sellers of professional services differently from all other businesses began their campaign, the medical industry was

uniquely lacking in competition. Today, competition is rampant and increasing regularly. The incentives and temptations to take action that restrain competition are greater than ever. Increased use of direct purchase arrangements by employers and unions, the excess number of physicians in many specialties, the pressure to close hospitals, and increasingly direct reimbursement for non-physician providers all add to the justification for retaining full FTC authority over the professions.

On previous occasions, we have provided a more detailed explanation of our position. Since then, circumstances have only become more critical, as described above.

In 1984, a series of events transpired that warrant attention. First, the FTC staff and Chairman Miller entered into a series of discussions with the AMA and a coalition of organizations which were in agreement that the FTC authority over the professions should not be reduced. The avowed purpose was to find a common ground which would allow the FTC reauthorization to proceed without being derailed by the professions issue. Basic principles were agreed to with both sides giving ground on some points: The essence of compromise. At all times, it was clearly understood that the agreements were a symbol, were the entre point for the actual legislative debate in Congress. There was no official "deal" or agreement with the FTC that could possibly be binding on the Congress for either report or legislative language.

When H.R. 2970 passed the House Energy and Commerce Committee, the basic principles agreed to were retained but the Committee saw fit to make some additions which have caused the professions to seek more relief from FTC authority. S. 1714 was very much influenced by the discord created when H.R. 2970 passed. It is important to note that the additional language of Section 25 (a)(2) and (c) of that House bill served to do only three things:

First, require that those areas from which the professions would be relieved of FTC oversight be based on facts rather than presumption. We believe this is positive because the FTC should evaluate the impact of its released authority, in such areas as "permissible tasks or duties . . based in fact on specialized training or education." The AMA contended that this is not fair because "the mere assertion that specialized training or education is necessary in order to perform the task or duty will not shield the requirement from FTC scrutiny" (Report language.) From the perspective of the payers and patients, we do not want FTC authority reduced on the basis of "mere assertion." The "need" for special training, just like the clarion of quality, has all too often been used to mask anti-competitive self regulation by professions.

Second, in recognition of the ease with which professional groups can use education, training, and licensure requirements to interfere with business and commercial practices, we encourage the Senate to note the broadening of the state action exemption under the Southern Motor Carriers Supreme Court Decision. FTC preemption of state licensing boards and thus state action exemptions is fundamental to overseeing the potential misuse of these state entities to restrain trade.

Third, section 25(c) of H.R. 2970 was added by the Committee to be clear that the relaxation of authority in the other parts of Section 25 were intended to help a profession only in its professional duties, not its business or commercial practices. Since the medical care industry is now nearly one-half trillion dollars strong, this hardly seems like an unreasonable clarification or retention of FTC authority.

From this controversy emerge a few key points for your consideration:

There is no clear distinction between such seemingly innocent functions as controlling educational requirements and wrongfully restricting access to employment in the healing arts. The FTC needs to be sensitized to the importance of professional standards of excellence but not to have its authority removed to investigate and correct abuses of such standards.

State action should not be an excuse for allowing a profession to violate national standards of open competition. State medical practice acts all too often have more basis in economic protection than in scientific integrity. When there is a body of federal law and legislative history, as there is with antitrust, state policy is always subject to appropriate federal scrutiny.

The professions have nothing to fear from the FTC, only from those members of each profession who would seek to close the door of competition at a very high cost to society.

A "clean" bill for FTC reauthorization is not as explicit as S. 1714 or H.R. 2970 regarding treatment of the professions, but it would represent an acceptable compromise. The WBGH would find the American Dental Association's proposal unacceptable, however.

We are delighted that Congress made clear its rejection of a blanket exemption for the professions. The language of the previous Senate bill, agreed to by the AMA, is significant progress, though it is no longer endorsed by that group.

In closing, we reiterate our concern with respect to treatment of the professionals, and urge Congress to remove this issue from all of our agendas by passing comparable legislation.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The NAM welcomes this opportunity to submit a statement in support of the long overdue reauthorization of the Federal Trade Commission. The Commission's last authorization was passed in 1980 and Congress has been unable to pass a reauthorization.

The National Association of Manufacturers is a voluntary business association of over 13,000 corporations, large and small, located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM member companies employ 85 percent of all workers in manufacturing and produce over 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

NAM members are very sensitive to the impact of FTC actions upon their businesses, both from the perspective of the commission's antitrust or "unfair methods" jurisdiction and from the Commission's consumer prohibitions on "unfair or deceptive acts or practices." Failure to enact an FTC reauthorization is very unsettling to our members because of the lack of firm Congressional commitment to the agency's activities. NAM members view the FTC reauthorization process as a significant opportunity to re-examine areas needing refinement. During the last Congress, the Commerce, Science and Transportation Committee reported out with bipartisan support, an FTC reauthorization bill—S. 1714—that the NAM supported. We understand that an identical bill will be introduced for the 99th Congress and NAM wishes to express its support once again.

The FTC is an agency of Congress. As the FTC Improvements Act of 1980 illustrated, the reauthorization process permits Congress, the public, and the federal agency the opportunity to reconsider both the direction of the underlying mandate and the means by which such responsibilities are carried out. As was evident with the FTC reauthorization process conducted in 1979/80, and bearing in mind that all Commission powers emanate from Congress, Congress proceeded with the view that limitations on the agency's exercise of federal investigatory and enforcement authority were needed. While the underlying policies of the agency remained intact, Congress, based upon evidence brought to light during reauthorization hearings, reached a consensus regarding the need for limitations upon the discretionary enforcement power of the agency.

The fact that the FTC remains on a two-year reathorization cycle allows constituents of the agency, including the NAM, the opportunity to bring before Congress relevant information relating to the success or failure of the agency in handling its mission. As has been seen in recent times, the reauthorization process, particularly with respect to the FTC, has taken on added importance. The basis for this heightened sensitivity to FTC authorization results from an acknowledged need for additional clarity of the Commission's discretionary authority and compliance requirements. We need not dwell upon actions initiated during the 1970's which documented the abuse of FTC authority, or the resulting costs incurred in attempting to mitigate and prevent such activity. For purposes of this statement, we need only cite the shared monopoly case against the cereal industry which the commission pursued with all vigor-based upon no more authority than the broad discretion bestowed upon the agency under the vague concept of unfair methods of competition and without any corresponding basis in fact or necessity. Under its consumer jurisdiction we need only cite the lengthy, expensive, and futile attempt to regulate and prohibit advertising directed at children, once again on the theoretical basis of unfairness. The FTC in more than a dozen proposed rules continues to attempt to regulate many of the sectors of our economy, for example so-called "product quality" issues, that have never before been regulated and indeed have been repeatedly rejected by Congress as fit areas for FTC intervention.

The ramifications of an arm of the federal government pursuing a course of action premised upon theory, speculation and misguided instincts are serious. Cost estimates in the aborted effort to challenge children's advertising place the incurred costs in government man-hours and exorbitant legal fees by parties in that single case in the millions of dollars.

The NAM views federal intervention, through the FTC or other agency action, as a course which should be pursued with caution. The vast power and resources of the

federal government should be reserved for those cases where policy guidance is explicit, substantial injury is likely to occur and could not be reasonably avoided, and the costs of the injury have a net effect which outweighs the overriding benefits to consumers or competition. NAM specifically urges that Congress, during this reauthorization process, focus upon the elements which form the basis for FTC prosecutorial and rulemaking discretion. Such a focus, we believe, will lead Congress to the recognition that past experience with the lack of statutory checks on the zeal of the Commission staff evidences a need for clear congressional direction. Further, the NAM suggests that Congress employ this authorization process to channel the resources of the Commission and to enunciate with clarity the basis both for federal intervention which will be consistent with policies that seek to accomplish deterrence, punishment and compensation. Each of these points is discussed below, in addition to the NAM's position on those provisions contained within the FTC Improvements Act of 1980.

The NAM, so as not to detract from the need for Congress to focus on FTC jurisdiction relating to "unfair or deceptive acts or practices", has deferred comment on that portion of the FTC Act dealing with antitrust matters during these reauthorization hearings. This, by no means, should be construed as NAM acquiescence to the present formulation, interpretation and application of that jurisdiction. Rather, the NAM considers the "unfair methods" jurisdiction to be, like the "unfair or deceptive acts or practices" jurisdiction, also a subject for needed clarification by Congress. By separating out this issue during these authorization hearings, the NAM urges that Congress soon return to consider the enforcement ramifications of the present application of "unfair methods". Such a focus on "unfair methods" jurisdiction should closely follow Congress' resolution of the definitional and prosecutorial difficulties inherent in the application of "unfair or deceptive acts or practices".

The issue of greatest concern to the membership of the NAM, at this time, stems from the ability of the Commission, under Section 5(a)(1), to challenge conduct on the basis of a prohibition of "unfair or deceptive acts or practices." That provision was created by Congress to bestow upon the FTC power to prevent conduct which bears no relationship to competition.

The NAM membership has struggled to define the meaning of the term unfair. As constituents of the FTC and subject to possible prosecutions and rulemakings, NAM members have sought to carefully interpret the legislative history and court decisions concerning the meaning of unfairness.

The legislative history accompanying Congress' enactment of unfairness provides little guidance for purposes of aiding compliance. The legislative history merely affirms that the term "unfair" is an ambiguous standard subject to subjective interpretation.

The NAM is certain that, without congressional input on the elements that form the basis for Commission actions, neither reliance nor clarity will be reflected in FTC actions. The fact that the leadership of the Commission is subject to change leads one to believe that earlier FTC statements of Commission interpretations may not be controlling. Similarly, as the issue of unfairness now stands, the subjective determinations as to what form of conduct constitutes "unfairness" will remain vested in the whims and prejudices of the Commission staff and members.

The only clarity that can be achieved and which will provide constituents of the Commission with some degree of certainty is to establish a series of criteria, each of which must be met prior to the FTC challenging any form of conduct premised upon consumer unfairness. By adopting this position, the NAM is urging Congress to reconsider the circumstances in which Commission action is desirable and productive to the consumer.

The NAM is confident that the past problems that have befallen the FTC and its constituents—needless prosecutions, improper allocations of resources, and vast expenditures of dollars—can be avoided through codification of prosecutorial and rulemaking standards.

The test for unfairness which the FTC endorsed and which NAM supports is embodied in the March 5, 1982 Commission letter to the Senate Commerce Committee and in last year's bill, S. 1714. It would require the Federal Trade Commission and its staff to demonstrate the bases for federal involvement.

This prosecutorial test is composed of three elements: (1) substantial consumer injury; (2) inability of consumers to reasonably avoid such injury; and (3) the injury in question is not outweighed by countervailing benefits to consumers or competition generally. Each of these elements, in our opinion, should be considered and viewed as essential determinations prior to commitment of the resources of the FTC on a particular case. Actions should be premised solely on the establishment of each

criterion. Failure to substantiate a basis of action because one element may be lacking would serve to prevent any FTC involvement.

SUBSTANTIAL CONSUMER INJURY

The first element should be the most basic consideration—the need to prevent harm. The injury must be of such substantial nature as to plainly justify federal intervention. As the Commission stated in its December 17, 1980, letter to Congress concerning unfairness:

Emotional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers.

We fully agree with this initial formulation of the meaning of substantial consumer injury. However, we view this formulation as initial because it has been cast in a negative manner as to what shall not be deemed substantial. NAM urges Congress to follow the Commission's most recent elaboration (March 5, 1982) on the meaning of substantial consumer injury and we suggest that this principle be codified so as to provide more certainty. In the letter, the Commission states:

As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress or offenses to taste or social belief.

AVOIDABILITY OF CONSUMER INJURY

The NAM also supports the Commission with regard to the test for actionable consumer injury. In its March 5, 1982 letter, the Commission formulated this test as follows: . . . an unfair act or practice must be one which consumers could not reasonably have avoided. The commission should not be involved in rectifying the unfortunate choice of a particular consumer decision. It should confine its activities to curb behavior that takes unfair advantage of consumers' inadequate knowledge in reaching a decision or inability to protect themselves from such behavior.

NAM recommends that this principle be codified. Each branch of the FTC's three-pronged test for consumer injury is of significance from a technical and legal point of view. This requirement—that the commission act only where consumers have no reasonable means of protecting themselves—is critically important. Indeed, it is the key to ensuring that FTC actions are meaningful contributions to the functioning of a free marketplace.

The FTC position supported by the NAM is no retreat to the old days of "let the buyer beware." Under the "reasonably avoidable" standard, the Act (Section 5) would continue to reach abusive conduct which distorts or frustrates consumer choices. Examples would include the selling of phony cures to seriously ill cancer patients,[1] or refusing to reassemble appliances supposedly dismantled for inspection until a contract is signed.[2] Both of these examples, drawn from established FTC precedents, illustrate consumer harm which would continue to be actionable.

At the same time, the FTC's practical approach clearly confirms that the Commission has no place as a "national nanny" or a utopian social and economic engineering agency with a mandate to tell Americans what is good for them. For example, where adequate maintenance, use and care information for a product is available, consumers who come to grief because they choose to ignore this information should not be treated as wards of the federal government. NAM policy language is explicit in supporting and encouraging disclosure of information to consumers. After all, if a seller's product is unsuitable or the seller's conduct is in fact unreasonable, consumers in the marketplace will penalize it far more quickly and effectively than the Commission.

At the core of our social and economic system is our faith in free and informed individual decision making. In the political arena, our society tolerates no interference with the individual's free choice in the voting booth. In the economic sphere also, we should tread cautiously before stripping the individual of his rights and responsibilities as a consumer.

COUNTERVAILING BENEFITS

The determination of countervailing benefits will force a matter in question to be fully balanced between the potentially harmful act or practice and the net practical

---

[1] *See, e.g., Travel King Inc.*, 86 F.T.C. 715, 774 (1975).

[2] *Holland Furnace Company* v. *FTC*, 295 F.2d 302 (7th Cir. 1961); cf. *Arthur Murray Studio Inc.* v. *FTC*, 458 F.2d 622 (5th Cir. 1972).

benefit to consumers or competition. This balancing of interests would require the Commission to quantitatively and qualitatively reduce its perception of a potential injury by the factors of economic costs and benefits that a practice may entail. In reaching this determination of "net" effects, the Commission should account for the costs of a prospective remedy, costs to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and other similar considerations.

The NAM views the Commission letter of March 5, 1982, as constructive in this respect and urges Congress to codify the principles and intent of that letter. The Commission's letter states a position wholly consistent with that of the NAM with regard to countervailing benefits: . . . the injury should not be outweighed by consumer or competitive benefits resulting from the challenged practice. Clearly, most business practices involve an economic and social mixture of costs and benefits; hence, unless a particular practice has the net effect of being injurious, the Commission should refrain from finding it unfair. In reaching its decision, the Commission should take into account costs related to a prospective remedy, including but not limited to direct costs to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and like matters.

SUMMARY OF THREE ELEMENT TEST

The NAM urges Congress to enact and codify a three element requirement which, upon being met, would substantiate a basis for FTC actions premised upon "unfair . . . acts or practices" jurisdiction. As evidenced by the Commission in its letter to Congress, the three criteria—substantial consumer injury, reasonable avoidability and lack of countervailing benefits—properly reflect a reasoned approach to balancing the federal interests in prosecution with the costs and benefits which may result from a questioned practice. This test further illustrates and reflects the sensitivity of Congress, the FTC and its constituents to the need to confine government intervention to acts and practices that require the powers and resources of the federal bureaucracy.

Turning to another issue, the NAM suggests that Congress reconsider the present construction and underlying basis of Section 5(m)(1)(B), the civil penalty section. While valid arguments exist which would support .epeal of this section, the NAM urges Congress to do no less than amend the Commission's 5(m)(1)(B) authority.

Under this Section, the Commission may seek to impose civil penalties of up to $10,000 against companies who allegedly violate final cease and desist orders entered in proceedings against other firms. NAM's concern relates to the inherent lack, within the substantive and procedural terms of Section 5(m)(1)(B), of due process accorded parties subject to the provision. Section 5(m)(1)(B) permits the FTC to impose penalties and requirements upon companies who were not parties to, nor provided notice and opportunity to be heard in, original cease and desist proceedings.

NAM urges that should Section 5(m)(1)(B) authority continue, Congress amend this provision as set out in last year's bill, S. 1714, to permit the defendant to challenge in court the legal basis for the FTC's prior order.

FTC IMPROVEMENTS ACT OF 1980

Intervenor funding: NAM has long opposed the funding, through taxpayers' dollars, of witnesses and public participants in agency rulemaking proceedings. Our premise throughout has been that the funding of intervenors extends beyond the policy justification of encouraging a broad range of views of agency proceedings, to having the general revenues supporting the arguments and philosophy of a small segment of the public. In this regard, NAM was active in opposing Section 18(h) (Intervenor Funding) of the FTC Act, and correspondingly was greatly supportive of the amendments in the 1980 FTC Improvements Act, which placed a cap on the level of compensation which may be paid to rulemaking participants. Although the Commission, at this time, has no funds with which to carry out any form of intervenor funding program, the cap on disbursements under that program are subject to expire, and the NAM wishes to again express its disapproval of any form of intervenor funding program and urges its discontinuation.

The NAM also supports an amendment to the FTC Act that requires a prevalency of an unfair or deceptive act before proposing a rule. We find the provision in last year's bill—S. 1714—as suitable for the purpose.

Also, the legislative veto mechanism (including the appeals procedure) in the 1980 Act has been declared unconstitutional and a new procedure must be found. NAM has long supported imposition of a legislative veto mechanism for reasons of fair-

ness and as a means to provide a check and balance upon the regulatory system. NAM will continue to press for a legislative veto mechanism throughout the regulatory process. The NAM will support a veto mechanism that provides for a resolution of disapproval by both Houses of Congress with a presidential signature requirement. We believe that this proposal will pass the constitutional test set out in the *Chadha* decision.

Statement of the American Advertising Federation

The American Advertising Federation (AAF) is a national trade association which includes within its membership all of the various elements of the advertising industry. The membership includes companies which manufacture and sell consumer products, advertising agencies, newspaper and magazine publishers, outdoor advertisers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation also represents the "grassroots" of the advertising industry because it is the parent body of more than 200 local advertising clubs and federations located throughout the United States and having a combined membership of approximately 36,000 advertising practitioners. These organizations, like the parent body, include advertisers, advertising agencies and media within their memberships.

Over the past six years the failure of the Congress to "authorize" the Commission, the action of the Supreme Court in declaring the legislative veto provision unconstitutional, and the addition of temporary statutory provisions has kept the FTC in a turmoil and has made it extremely difficult for the industry and the bar to determine what the law is and how it will be enforced. We urge an end to this uncertainy by the enactment of legislation to authorize the Commission and to provide it with statutory direction as to how it shall excercise its powers.

Our central aim is to secure an amendment to the FTC Act which will bring an end to the FTC's infatuation with the concept that advertising which is neither untruthful nor capable of deceiving, by omission or otherwise, can nevertheless be banned or regulated on grounds of "unfairness".

We are still strongly in favor of the repeal or amendment of Section 5(m)(1)(b), the provision which permits "backdoor rulemaking" and repeal of Section 18(h), the "intervenor funding" provision. Rather than repeating in this statement the arguments we previously made on these subjects, we refer the Committee to our previously filed statements.

This statement also asks the Congress to correct an apparent oversight by the drafters of the Magnuson-Moss Act in Section 18(e)(1)(B) of the FTCA, which almost vitiates the rulemaking procedural safeguards requirements of the act by permitting the Commission to base a trade regulation rule on anything it considers relevant even though it was never submitted and made a part of the rulemaking record. The procedural safeguards of oral hearing, cross examination and requirement of substantial evidence are in jeopardy.

Finally, this statement opposes two proposals which were contained in past bills. We oppose making an order to cease and desist final within sixty days without regard to whether or not an appeal is pending in a circuit court. Also, we oppose any proposals which would restrict the Commission's ability to prevent private groups, professional or others, from interfering with the commercial speech of any practitioner or group of practitioners.

FTC's lack of authority to regulate the content of commercial speech on the basis of alleged unfairness should be codified by a statutory amendment

On behalf of its members, the AAF strongly urges that Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(2)) be amended by inserting immediately before the period at the end thereof the following: Provided, that the Commission shall have no authority under this section or section 18 to prohibit or otherwise regulate the content of commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

This proposal is identical to Section 14 of S. 2499 which was introduced by Senator Kasten on April 13, 1982 except that we have substituted the phrase "the content of commercial advertising" for the phrase "any commercial advertising". We believe that this narrowing change is desirable to make it clear that the amendment is designed to protect commercial speech from unconstitutional regulation.

Unfairness is a totally vague concept. Its application to commercial speech is unnecessary to protect the public. Since 1980, the Congress has time and time again

placed a ban on the use of unfairness in trade regulation rulemaking and there is no sign that this has adversely affected the protection of the public. In fact, the Commission has apparently used the resources formerly devoted to "unfairness" rulemaking to bringing more individual cases. Chairman Miller has stated the Commission has brought more advertising cases in 18 months than were brought in the four years before he took office. Advertising Compliance Service, IV, 8 (April 16, 1984). See also Chairman Miller's testimony on April 16, 1985 before the House Subcommittee on Commerce, Transportation and Tourism.

Unfairness is always merely within the eye of the beholder. In other words, there is no core concept which gives coherence to this subjective, non-standard. Therefore, attempts to define unfairness in the speech area will be insufficient to ensure that the First amendment rights of advertisers are not infringed.

As we have stated in the past, abrogating unfairness will not undermine the FTC advertising substantiation program, which we have and will continue to strongly endorse. The Federal Trade Commission, without unfairness, has enormously broad powers to regulate advertising under its false or deceptive authority. This authority is completely adequate to protect the public and the integrity of the marketplace. Therefore, we strongly urge that you codify what the Congress has continually ratified on a temporary basis for the last five years and permanently ban unfairness as a basis for regulating advertising content.

The unfairness standard is unconstitutionally vague when applied to speech

In *NAACP* v. *Button*, 371 U.S. 415, 432-433 (1963) the Supreme Court said "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity". The reasons for this rule were stated by the Court in *Buckley* v. *Valeo*, 424, U.S. 1, 41, note 48, in these words:

". . . vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked'. [citations omitted]

In this connection a noted legal authority has commented to this Committee:

The "unfairness" doctrine also runs contrary to the "basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned* v. *City of Rockford*, supra, 408, U.S. at 108. While the doctrine of void-for-vagueness is usually applied to criminal statutes, it is nevertheless true that an unduly vague law, even in a civil context, runs counter to the values underlying the idea of due process. This is particularly a problem when the law concerns speech which it may chill.

A vague law that implicates First Amendment rights "inevitably leads citizens to 'steer wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked." *Id.* at 109 (footnote omitted).

While Section 5 is not a criminal statute, the possibility of heavy litigation costs, unfavorable publicity, and a broad order banning more advertising than is involved in the particular case, all are likely to chill truthful commercial speech.[1]

We have previously told the Committee that advertising is an art form; it must motivate and persuade or its cost is mere economic waste. Advertisers must be free to use words without the chilling fear that some government authority utilizing the unfairness doctrine is looking over their shoulders. In his statement to the Commission at its 1971 hearings on advertising practices Mr. A.J. Seaman, then President of SSC&B, Inc. Put it this way:

Advertising people frankly view words as the indispensible tools of their trade. We want the freedom to use them to create images, to set moods, to motivate, to persuade and to sell. We love words; we respect them; and we know we must use them with judgment and restraint.

He also urged the Commission to "realize that words are like chameleons, ever changing, subject to many meanings and shades of meaning" and concluded with this plea, *"Please do not make the rules required to stop the excesses on the periphery so broad and general that they smother enterprise and excellence at the core". Advertising Management and Society*, McGraw-Hill, 1974 p. 304, 307, 308. (Emphasis supplied).

---

[1] Comments of former Solicitor General Robert H. Bork, then a professor at Yale Law School, to the Senate Committe on Commerce, Science and Transporation, 96th Congress, 2nd Session. Committee Print entitled Unfairness; Views on Unfair Acts and practices in Violation of the Federal Trade Commission Act.

Finally, on this subject, we submit that neither the Commission nor any other person or group which espouses the FTC's authority to apply the unfairness doctrine to advertising has presented any convincing argument or evidence that lack of the authority would impair the Commission's ability to protect the public. Indeed, no pragmatic showing its possible because, the Commission has never issued a complaint against advertising which charged only unfairness. Without exception, the charge has been that the ad was an unfair or deceptive act or practice. This was true with respect to the consent order proceedings which involved television advertisements depicting children doing allegedly dangerous acts such as using an electric hair dryer near water, riding bicycles into the street without looking for traffic and cooking rice on a stove. In our view, these are classic deception cases in which the Commission believed the ads had the tendency or capacity to mislead children to imitate dangerous acts. We certainly agree that children are a specially vulnerable group but injecting unfairness into these situations only muddies the water and may obstruct rather than aid resolution of such cases.

Restoring the congressionally mandated procedural safeguards to FTC rulemaking

Our second legislative request is for a statutory amendment to preserve and restore the procedural safeguards which the Congress enacted for FTC rulemaking in the Magnuson-Moss Act. We are convinced that those safeguards have been rendered largely "inoperative" by a decision of the United States Court of Appeals for the District of Columbia. *Association of National Advertisers, et al.* v. *FTC, et al.*, 627 F.2d 1151 (D.C. Cir. 1979) *Cert. den.* 447 U.S. 921. That decision, rendered in a case in which AAF was one of the litigants, held, in effect, that a Commission trade regulation rule need not be based upon evidence adduced during the rulemaking procedure but can be lawfully based upon ". . . any other information which the Commission considers relevant to such rule." The language we have just quoted appears on Section 18, the "rulemaking" section of the FTC Act, and for the reasons developed below we urge that it be stricken by legislative amendment.

In June 1973, the United States Court of Appeals for the District of Columbia ruled that Section 6(g) of the FTC Act authorized the Federal Trade Commission to promulgate trade regulation rules. *National Petroleum Refiners Association, et al.* v. *FTC, et al.*, 482 F.2d 672, *Cert. denied* 415 U.S. 951. With respect to the procedures followed by the Commission in Section 6(g) rulemaking the court said:

Furthermore, under the Administrative Procedure Act the public, including all parties in the industry who might be affected, are given a significant opportunity prior to promulgation of a rule to ventilate the policy and empirical issues at stake through written submissions, at a minimum, *see* 5 U.S.C. § 553, or more, as here, where the money permitted oral argument in a non-adjudicatory setting. *Id.* at 692.

Thus, the Commission was empowered to enact substantive binding rules pursuant to the informal "notice and comment" procedures set out in the Administrative Procedure Act.

Certiorari was denied by the Supreme Court on February 25, 1974 (415 U.S. 951) and less than eleven months later, on January 4, 1975, the Magnuson-Moss Act was signed into law as Public Law No. 93-637. That law added new Section 18 to the FTC Act which substantially altered the informal nature of FTC trade regulation rulemaking procedures. The House Committee on Interstate and Foreign Commerce, in reporting out the immediate predecessor to Section 18, stated that the notice and comment standard of informal rulemaking was "inadequate for proceedings in which the integrity of the proposed rule may rest on the resolution of issues of material fact" H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., p. 33 (1974). The Committee stated:

Because of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words 'unfair or deceptive acts or practices', the Committee believes greater procedural safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described below which we believe to be more appropriate in this context than merely relying upon the provisions of Sections 553 and 706 of Title 5. *Id.* at 45-46.

The "procedural safeguards" which Congress incorporated into Section 18 transformed FTC rulemaking procedures from informal, 5 U.S.C. § 553 type proceedings to proceedings more closely akin to those specified in 5 U.S.C. § 556 and § 557. Section 18(b)(3) and (4) mandate a hearing and a transcript thereof. Section 18(c)(1)(B) requires that any disputed issues of material fact must be resolved by permitting rebuttal submissions and cross examination. Section 18(e)(1)(A) provides that any person may petition a Court of Appeals for review of the rule. Section 18(e)(3) directs that rules shall be held unlawful on any ground specified in 5 U.S.C.

§ 706(2)(A), (B), (C) or (D), if the rule "is not supported by substantial evidence," or if the rights of cross examination and rebuttal submission have been curtailed so as to preclude disclosure of disputed material facts "necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole".

But, either by mistake, inadvertance or oversight, Congress included a definition of the term "rulemaking record", Section 18(e)(1)(B) which has now been interpreted in a manner to vitiate most of these safeguards. The provision reads: (B) For purpose of this section, the term "rulemaking record" means the rule, its statement of basis and purpose, the transcript required by subsection (c)(5) of this section, any written submissions, *and any other information which the Commission considers relevant to such rule.* (Emphasis supplied)

Even when viewed in the abstract the phrase "and any other information which the Commission considers relevant to such rule" is clearly inconsistent with the other provisions of Section 18. It is conceivable that this statutory anomaly could have been recognized as such by the Commission and the courts and not given effect in a manner which conflicts with the Congressional intent expressed in the statute as a whole. But, such is not the case.

In *Association of National Advertisers, Inc., et al.* v. *FTC*, supra, the D.C. Court of Appeals ruled that an FTC commissioner could not be disqualified from voting in a rulemaking proceeding on grounds of public statements prejudging the issue unless ". . . there has been a clear and convincing showing that the agency members has an unalterably closed mind on matters critical to the disposition of the proceeding." 627 F.2d at 1170.

The appellees in the case had urged that the standard to be applied in disqualifying a commissioner in a Section 18 rulemaking proceeding was similar to that which had been applied in an adjudicatory proceeding, *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970), in which it was held that a commissioner could be disqualified if "a disinterested observer may conclude that [the decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 425 F.2d at 591.

In support of the application of this standard to Section 18 rulemaking the appellees argued that the disqualification standard for adjudicative proceedings was appropriate because the ultimate decision must be based upon record evidence. The court disagreed, saying:

Section 18, in fact, provides that for purposes of judicial review the "rulemaking record" includes "any . . . information which the Commission considers relevant to such rule." 15 U.S.C. § 57(a)(e)(1)(B) (1976). *Section 18, thus does not prohibit reliance on material not adduced during the rulemaking procedures; it simply requires the Commission to acknowledge that reliance.* 627 F.2d at 1160, n. 14 (Emphasis supplied).

In a forceful dissent Judge MacKinnon argued that the majority's view is contrary to the language of the statute and contrary to the statements of Representative Broyhill and Senator Moss made during debate. He quoted Mr. Broyhill as follows:

[I]t is necessary to clarify the language in the conference report, not because of any disagreement among the conferees but because of some legal interpretation of the language which was included in the conference report. *We want to make crystal clear that any rules issued by the commission must be based upon the substantial evidence that is developed in consideration of the rule.* That is the purpose of the amendment—to clarify the provision in the Judicial Review section. (120 Cong. Rec. 41408 (Dec. 19, 1974) (remarks of Rep. Broyhill) (Emphasis added).)

We now ask Congress to restate its intent, as expressed in the original Magnuson-Moss Act, that FTC trade regulation rulemaking must afford "interested persons" the right to comment and cross examine on all evidence which the Commission relies upon as a basis for its final decision. The best way to accomplish this is to strike the offending words from the statute.

Congress should not make FTC orders final while an appeal is pending and should not deny the Commission jurisdiction to remove restraints on the rights of professionals to advertise

For at least eight years Congress has been asked to amend the FTC Act to make orders to cease and desist final within sixty days even though an appeal is pending in federal court. The latest of these proposals is contained in Section 7 of S. 1714 introduced by Senator Packwood on July 29, 1983. This amendment would make an appealed order final within sixty days unless either the Commission or the court in which the appeal was pending granted an application for a stay.

We oppose this proposal for several reasons. First, Section 5(e) of the FTC Act mandates that appeals of FTC orders "shall be given precedence over other cases pending therein, and shall be in every way expedited." The courts have obeyed this statutory instruction and FTC cases are decided promptly.

Second, the term "order to cease and desist" has become a misnomer. The orders which the Commission issues today are more in the nature of writs of mandamus. They direct the respondent to do affirmative acts such as insert "corrective advertising", make restitution to consumers or inform consumers as to various subjects. If such orders are made final before resolution of the appeal, the appeal itself is moot.

The application for a stay procedure contained in the proposal would impose additional expense upon the government and the parties. The application would have to be supported by briefs and would take the valuable time of lawyers who would otherwise be concentrating on the appeal process. Moreover, the applicant for a stay would have to convince a court that it was likely his appeal would be granted on the merits. Thus, he would have to make the same showing, perhaps in truncated form, that he will eventually make in his appeal.

The Federal Trade Commission now has ample power to secure temporary restraining orders and injunctions from federal courts whenever it has reason to believe that any person is violating or is about to violate any of the laws it enforces. Pursuant to 15 U.S.C. § 53(b) it can get such injunctions even before it files an administrative complaint. Thus, the Commission has complete authority to stop a harmful practice as soon as it learns of it. The public is fully protected and there is simply no need to advance the effective date of an order which is being appealed.

Finally, the AAF has noted with approval that the Federal Trade Commission has instituted several proceedings against organizations which seek to prevent their members from advertising. We are certain that such restraints on advertising are unlawful (*American Medical Assn.* v. *FTC*, 638 F.2d (2d Cir. 1980) affmd. 455 U.S. 676) and we can discern no reason why the FTC should not remain free to dissolve them. We are aware that some professional groups have presented sincere arguments as to why they should be exempt and we assume some compromise on this issue is possible. However, in our view, absolute bans or crippling restrictions on the right to advertise are unlawful and the Federal Trade Commission should remain free to prevent them.

CONCLUSION

We appreciate this opportunity to testify and thank the Committee for the attention it has given to our views. We share the general concern that the FTC's ability to protect consumers and competition from unlawful acts should not be impaired. But we sincerely believe that the Commission, in pursuit of the amorphous unfairness concept has overstepped the boundaries of appropriate regulation and has invaded an area protected by the First Amendment. We seek no protection from legitimate, constitutional regulation of advertising but only the right to practice our profession free of the chilling specter of "unfairness". Enactment of our proposal will not injure the Commission but will serve to redirect it to its primary, long standing function of regulating advertising to insure that it does not deceive or mislead. The public interest will be better served as a result.

STATEMENT OF THE AMERICAN DENTAL HYGIENISTS' ASSOCIATION

Mr. Chairman: The American Dental Hygienists' Association is pleased to have this opportunity to present its views on reauthorization of the FTC, particularly regarding the FTC's jurisdiction over the health professions. ADHA represents approximately 30,000 health professionals licensed in all 50 states and the District of Columbia. They must graduate from an American Dental Association-accredited school of dental hygiene (except in Alabama which has preceptor training), at a community college from which they must receive an associate degree, or at a university from which they receive a baccalaureate degree. Dental hygientists then must pass National Boards (except in Alabama) and state or regional boards to obtain a license. There are no unlicensed dental hygientists. In most instances, their major task is to perform oral prophylaxis—teeth cleaning. Most states presently require that this task and others be performed under the direct supervision of a dentist. This menas then that the dentist must be physically present for the hygientist to work at any office, prision, rural health clinic or nursing home. Thus, the ability of a person to become a dental hygientist through education, licensure and actual practice is carefully controlled by another member of the dental team—the dentist himself. It is therefore natural that we have great interest in these proceedings

today and that we have a considerable stake in your decisions about the role of the FTC in policing the anti-competitive practices that may exist within the intricate, self-regulating atmosphere of the health care community.

It is a fine line indeed that exists between what is considered *quality of care* and *business and* commercial practices. It is no secret that there is increasingly keen competition for every health care dollar. We are told of a "doctor glut", contributed to both by increasing numbers of American medical school graduates and by the influx of large numbers of foreign medical school graduates. A similar phenomenon is occurring elsewhere, creating a rapidly increasing supply of health professionals in the marketplace. At the same time, as we see a growth in the number of health care providers, we are witnessing a dramatic squeeze in the distribution of health care dollars. DRGs, HMOs, PPOs are manifestations of a cost-conscious Congress, employer, and consuming public. To assert that medicine and dentistry is not a business and that it can continue to survive in the pristine environment of yesterday's easy-going and benign family doctor or dentist is to indulge in nostalgia and lose sight of reality in the '80s. Today's successful health practitioners must be good businessmen and women and must attract patients. And, that practitioner must hold onto those patients for dear life. This had led to a highly commercial atmosphere among all professions. It has produced advertising. It employs direct sales. It brings in non-health professionals to run pivotal sectors fo the business. And, it has increased the potential for anti-competitive activity to assist one or a group of practitioners in gaining an unfair advantage over others.

It is in this environment that practitioners and the state boards which they dominate exist. Boards establish minimal education standards and test would-be practitioners on their accumulated knowledge. The Boards therefore are an important force in maintaining the quality of newly-certified practitioners and their practical effect is to control the numbers of those entering the profession. So long as the motive of a Board is to admit to practice only the most qualified of individuals, there can be no quarrel with their decisions. But on occastion these boards, dominated by one class of practitioners and acting as the de jure instruments of state policy, step across a line and act for no other purpose than to keep another class of professionals out of the marketplace. On other occasions, a board or consortium of professionals may act to prohibit or require action that has no real relationship to the quality of health care delivery but relate only to the manner that another does business. [One exampie would be banning the fitting and sale of eyewear in a shopping center.] It is into this environment too that the FTC must gingerly step. The FTC has a traditional and clearcut mandate to regulate unfair methods of competition and to regulate unfair or deceptive acts or practices. It as two conflicting influences however: a principle of law now applied to the Sherman Act that precludes the FTC from overriding a state when a state has spoken on a matter (the "state action" doctrine), yet it must have some preemptive authority when state boards are mere vehicles for one profession imposing anti-competitive restraints on another.

Several years ago, however, a segment of the health care community attempted to drive the FTC completely out of the health care arena. Arguing that the FTC had indulged itself in numerous excesses of regulation (not without some basis in fact) and proclaiming that health care could regulate itself at the state level, these health professionals attempted to carve out a special niche of exemption for themselves enjoyed by almost no other sector of American commercial life. Disclaiming their commercial instincts and professing a single-minded concern for their patients, these groups failed to persuade the Senate and the public, as evidenced by the outpouring of mail, editorials and finally a decisive vote on the Senate floor relating to an amendment by Senator Warren Rudman. To address these concerns, however, a member of that group—the American Medical Association—set about meeting with its regulator—the Federal Trade Commission—to compromise their differences. It did so without including its principle allies, its opponents among the allied health professions most endangered by the proposal, and the United States Congress. The ultimate agreement—known as the "Miller-AMA compromise"—was returned to Congress for "ratification." Although perhaps unfortunate for the agreement, but nevertheless fortunate to the health community, it was never ratified.

The AMA-Miller compromise applies the state action doctrine to Section 5 of the Federal Trade Commission Act. It also precludes FTC intervention when a "state" has established training, education or experience standards for licensure. Nor may the FTC override the state in establishing the permissible tasks and duties that may be performed by professionals based on their specialized training and education. It did not however address the situation when a group of professionals, acting under color of state authority, proscribed other professionals from performing tasks or duties as a means of lessening competition, rationalizing aloud that it was because

this professional really had insufficient training or education. A second objection was that there was no real demarcation between quality issues, where the FTC should defer, and business and commercial practices where the FTC has had a role in almost every other sector of the economy. Accordingly, ADHA has favored adding two words—"in fact"—which permits the FTC to look behind sham pronouncements about training and education and simply conclude, if it has the evidence, that a professional's livelihood cannot be stifled and his responsibilities constrained by a subterfuge. And, secondly, ADHA has urged retention of the traditional FTC jurisdiction over business and commercial practices with specific language to that effect in the statute.

ADHA believes that the Miller/AMA language without these safeguards is *not* acceptable. The Commission under Chairman Miller has functioned well in the health professions arena without any language constraining their enforcement authority for the past four years. The Commission, as a practical matter, recognizes the appropriate application of the state action doctrine and has de facto applied the doctrine in health professions enforcement. And, the FTC has used good judgment in walking that tightrope between quality of care issues and business and commercial practices.

We respectfully urge the Committee to modify the Miller/AMA language as we have suggested. It is important for the FTC to retain their legitimate though limited jurisdiction over the health professions. This Committee is therefore critical in keeping the health professional marketplace competitive.

STATEMENT OF THE COMMITTEE ON ANTITRUST AND TRADE REGULATION ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Committee on Antitrust and Trade Regulation of The Association of the Bar of the City of New York appreciates this opportunity to address the very important issue of the jurisdiction of the Federal Trade Commission over the professions.

The Association of the Bar of the City of New York is a voluntary bar association with over 14,000 members. The Committee on Antitrust and Trade Regulation has 27 regular members and six adjunct members. The members of the Committee on Antitrust and Trade Regulation represent a broad spectrum of lawyers and judges with experience in all aspects of antitrust enforcement and litigation. This statement has been unanimously approved by the Committee on Antitrust and Trade Regulation.

The Committee on Antitrust and Trade Regulation of The Association of the Bar of the City of New York has been concerned with the issue of the jurisdiction of the FTC over the professions for some time. In December 1982, we opposed the proposal then pending in the Senate to exempt the professions altogther from the jurisdiction of the FTC. In August 1983, we adopted a position paper which approved Section 8 of H.R. 2870 as reported by the House Committee on Energy and Commerce, and which opposed the amendment introduced by Representative Hall. In November 1983, we opposed the amendment introduced by Senator McClure. Our position today is based on the same principles as those underlying our earlier statements.

Our basic position is that in the absence of compelling reasons to the contrary, the commercial practices of professionals should be subject to the same strictures as commercial practices in other sectors of the economy. In *Goldfarb* v. *Virginia State Bar* 421 U.S. 773, 788 (1975), the United States Supreme Court stated with respect to the legal profession: "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." This conclusion is valid for other professions as well. Professional services of all kinds are an important and growing segment of the American economy. Public policy should strive to create an environment in which the highest quality professional services are delivered to the public at the lowest possible cost. These are precisely the goals of the antitrust laws and the Federal Trade Commission Act.

In our judgment, these principles are particularly applicable to the legal profession. It has long been recognized that lawyers must adhere to standards stricter than those of the marketplace if they are to command the public confidence which their unique position in society requires. *See e.g.* Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1 (1934). For the legal profession to seek or receive an exemption from the legal standards which are applicable to others would raise the spectre of lawyers being held to a looser standard than the rest of society. The adoption of such an exemption could only have the effect of diminishing public confidence in the bar at a time when such confidence is more necessary than ever before.

In taking this position, we do not mean to imply that there are no relevant differences between the professions and the other sectors of our economy. We recognize that the legal profession and other professions have special responsibilities and legitimate areas of professional concern that render certain collective activities, such as those dealing with professional ethics and discipline, appropriate under the antitrust laws. As the United States Supreme Court stated in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas."

We do not believe, however, that legislation restricting the FTC's jurisdiction over the professions is necessary or desirable in order to insure that the FTC does not invade the legitimate domain of professional self-regulation. In our judgment, the FTC's track record in this area has not been an irresponsible one, and we see nothing in the FTC's treatment of the professions which calls out for intervention by Congress. There has been no showing that FTC regulation has adversely affected the availability or the quality of professional services in this country. At the same time, we believe that the FTC has played an important and constructive role in removing restraints of trade in various professions.

Regulation of the professions by the FTC complements rather than duplicating the role of state regulation. The primary focus of state regulation of the professions has been the quality of professional services, while the primary focus of the FTC has been the commercial aspects of such services. This is not to say that quality concerns and commercial concerns never overlap. Experience has shown, however, that it is generally possible to reconcile the competing considerations of quality and competition even where they appear to be in conflict. The FTC has shown its awareness of the need to achieve such a balance, and by and large it has succeeded in achieving such a balance in this area. On the other hand, there have been numerous instances in the past in which state regulatory bodies have acquiesced in restrictions on the commercial practices of professionals which have clearly hurt the consumer. Thus the existence of state regulation of the professions in no way obviates the need for FTC regulation.

For all these reasons, we strongly believe that the FTC's authority to regulate professionals should not be restricted unless and until there has been a clear showing of abuse. We do not believe that there has been any such showing at the present time.

If the Subcommittee should conclude legislation is required in this area, we would strongly urge that such legislation be limited to that set forth in Section 8 of H.R. 2970 as reported by the House Committee on Energy and Commerce in the 98th Congress. This section would have added a new Section 25 to the Federal Trade Commission Act which would have barred the FTC from using its authority to prohibit unfair or deceptive acts or practices so as to invalidate any state law or regulation establishing "(1) training, education, or experience requirements for the licensure of professionals, or (2) permissible tasks or duties which may be performed by professionals and which are based in fact on specialized training or education."

If such a provision is adopted, we believe that it is very important that it be adopted in conjunction with the proviso added by the House Committee in Subsection (c) of the proposed Section 25 of the Federal Trade Commission Act, which read as follows: "Nothing in this section shall be deemed to restrict the Commission's authority under this or any other Act with respect to commercial or business acts or practices of professionals."

The adoption of such a proviso is highly desirable in order to forestall any claim that Congress intended to undercut the jurisdiction of the FTC over business or commercial activities of professionals.

We do not believe that this Subcommittee should adopt the amendments proposed in the last Congress by Representative Hall and Senator McClure, or any similar amendments. While the language of these amendments was far from unambiguous, the intended result of both amendments appeared to be to exempt from the jurisdiction of the FTC any profession which was subject to state regulation. For all the reasons outlined above, we believe that such an exemption would be extremely unwise.

NATIONAL GROCERS ASSOCIATION,
April 23, 1985.

Hon. ROBERT W. KASTEN,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR SENATOR KASTEN: On behalf of the National Grocers Association, permit me to express our appreciation for your willingness to include the enclosed Association formal statement within the official Commerce, Science, and Transportation Committee's record of your hearings on Federal Trade Commission reauthorization scheduled for April 24th.

We understand the Committee's desire to strictly limit personal testimony and to focus upon the narrow, technical issues which concern Commission reauthorization and the legislative veto. However, N.G.A. does feel that it is difficult to adequately endorse or oppose reauthorization of the Commission's formal legal authority without at least some examination of its actual historical exercise of such powers.

Certainly, in the absence of such an examination, there is a distinct danger that approval of reauthorization may be seen not merely as an institutional endorsement, but as specific approval of actual F.T.C. policies and practices. This would seem to be the suggestion of Commission Chairman James C. Miller in testifying last week before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce. Mr. Miller argued, in his formal statement, that reauthorization by Congress would mean that "staff work will be heightened by the knowledge that their activities reflect the will of the American people, expressed through the political process." (Emphasis added.) Given the legislative and hearing process thus far followed by the Congress, we would strongly reject any such inference of policy approval. We would hope that your Committee members would agree and that the Committee would make explicitly clear that its judgments upon reauthorization do *not* imply any concomitant evaluation of the actual historical record of the Commission itself.

Certainly, it would seem that no such inference would be at all valid without extremely close questioning of *both* representatives of the Commission *and* those of numerous other segments of the business and public communities affected by their past actions. Of course, we would hope that your members would be most diligent in their examination of Chairman Miller on a number of issues upon which the Commission has acted, or failed to act, in recent years to the detriment of the small business community. However, given the limited time available, we would urge the Committee to give consideration to the prompt scheduling and conduct of formal oversight hearings which might given these serious issues the direct attention they deserve.

Permit me to close with a final expression of our gratitude for all of your efforts to achieve a prompt role and direction for the Commission's activities as they vitally affect the nation's small business community.

Sincerely,

THOMAS K. ZAUCHA, *President.*

Enclosures.

STATEMENT OF THE NATIONAL GROCERS ASSOCIATION

The members of the National Grocers Association comprise the small business sector of the food retail and distribution industry and include 2,000 independent food retailers, 62 wholesale distributors serving 28,000 stores nationwide, as well as 60 state and local food associations. Our members are part of the largest segement of the U.S. retail sector. According to the U.S. Department of Commerce, total sales for food retailers reached $281 billion in 1984 and are expected to exceed $300 billion this year.

The Association appreciates the Committee's desire to restrict the focus of these Hearings to the narrow range of technical issues which surround the legal reauthorization of the Federal Trade Commission and the desirability of a legislative veto over certain Commission actions. However, it is the Chairman of the Commission himself, James C. Miller III, who attaches considerably broader significance to the proposed reauthorization. In the Chairman's official April 16th statement before the recently completed House Subcommittee on Commerce, Transportation and Tourism Hearings, he noted that reauthorization by Congress will mean "staff work will be heightened by the knowledge that their *activities* reflect the will of the American people, expressed throught the political process." (Emphasis added.)

N.G.A. finds the Chairman's equation of approval of the Commission's legal status with an endorsement of its "activities" both understandable and distressing. It is

comprehensible since it is difficult to clearly evaluate the merit of reauthorization of specific legal authority and power without a careful and precise examination of how and why that authority has been practically exercised. While there may be a technical distinction of some nicety here, Congressional reauthorization of F.T.C. authority will, in fact, be a reauthorization of a certain package of powers to be exercised by a number of specific individual Commissioners. In that light, one would feel that a careful examination of their past record of utilization would be most relevant.

In the absence of a formal "use" evaluation by these Hearings, such an examination will be the focus of this statement by the national Grocers Association. We appreciate the Committee's willingness to include it in the formal hearing record, and to give careful concern to its message.

The statement does not attempt to articulate the full range of concerns over present Federal Trade Commission policies and practices which this organization and numerous other small business groups now experience. However, it does set out some of the most important issues which now press upon all Americans.

The National Grocers Association is not a late convert to this cause. The subject of prpoer national antitrust policy is one to which the Association, its members, and the Board of Directors have devoted considerable attention and resources for a number of years.

More specifically, beginning in March of 1983 the N.G.A. Board of Directors formally expressed the necessity for Federal Governmental Agencies to maintain a strong and consistent antitrust enforcement policy.

In August, 1983 N.G.A. expressed its concern with the philosophies of antitrust regulation offered by the Department of Justice in recommending termination of a consent decree against Safeway which had prohibited various predatory pricing practices.

In October, 1983 the N.G.A. Board of Directors again outlined the obligation of antitrust enforcement agencies to examine and investigate all potential predatory pricing practices. The Board authorized the N.G.A. staff to provide necessary assistance and support to members asking for Governmental investigations.

In November, 1983 N.G.A. wrote Timothy Muris, F.T.C. Director of the Bureau of Competition, expressing support for a request by six retail grocery companies for an F.T.C. investigation in the Indianapolis area.

In March, 1984 Timothy Muris, Director of the Bureau of Competition appeared at the N.G.A. Public Affairs Conference and announced a series of F.T.C. hearings on the impact of warehouse stores on retail grocery price competition.

In September, 1984 N.G.A. Counsel testified at the F.T.C. hearing in Milwaukee.

In December 1984 on behalf of the N.G.A. I testified in Indianpolis.

Both during and subsequent to this time we have met with, and exchanged correspondence with the F.T.C. staff; Timothy Muris, Director of the Bureau of Competition; and James Miller, the Chairman of the Commission. Most recently, on March 25, 1985 we wrote to the President of the United States expressing our concern over the direction of F.T.C. regulatory policies. This is simply a chronology of our activity with the Commission. What is not mentioned are the numerous hours of informal consultation with N.G.A. counsel, staff and meetings with the F.T.C. staff attempting to effectuate a strong and consistent enforcement policy.

All of these actions reflect a deep commitment on N.G.A.'s part to the creation and preservation of an effective legal framework which permits the functioning and growth of the small business sector within our economy. We fully believe that a strong and consistent federal antitrust regulatory policy will assure a competitive retail food industry, one which will maintain not only competitors represented by large national chains but also by community owned multi-store and single store operators. Within an environment of such protected diversity the nation's interests will undoubtedly be best served. As was previously noted, the National Grocers Association fully recognizes the essential role which government regulations must play in such an economy. Certainly, the government has historically been aware of its role.

Our government began its recognition that a totally free market is not always a totally fair market in the late 1800's. Since that time pieces of legislation such as the Clayton, Sherman and Robinson-Patman Acts have operated to create a regulatory framework dedicated to preserving an open competitive market which is free from excess and abuse. Quite often in assessing such a statutory structure experts utilize the phrase "the life of the law." By this they mean that an optimal regulatory plan permits all parties sufficient flexibility so adjustments can be made to account for changing circumstances, advances, and innovations. The proper mix of legal authority, and intelligent discretionary application thereof, can insure effec-

tive functioning of a system long after the immediate problems which caused its inception have passed. This is most assuredly the case within the realm of antitrust regulation. Phrases such as "restraint of trade," "anticompetitive practices," "monopolization," "predatory pricing," and others which appear in the relevant statutes and their accompanying history provide only a general direction and purpose. The total antitrust regulatory framework which has thus been created is not a collection of mechanistic, carefully calculated mathematical formulas, specifying in great detail who may do what to whom, when, and how. Rather it is an attempt, and often a most successful one, to provide an effective legal basis to attack those who would excessively tamper with the free market system, their abuses to be defined in light of the regulations' overall purposes and the particular tools and circumstances of the times. Only with such inherent discretion and flexibility can laws designed to combat the "robber barons" of the 1890's and 1900's now deal with complex corporate predation and maneuvers of the 1980's.

However, the National Grocers Association and numerous other members of the small business community have serious questions as to the current exercise of available statutory authority by the Federal Trade Commission and other relevant regulatory-law enforcement agencies. Within this context the issue of appropriate federal antitrust "enforcement" policies has arisen ever more seriously.

Of course, if you were to ask general questions of the Federal Trade Commission regarding its enforcement actions you would undoubtedly receive a variety of assurances. The usual screen of numbers and statistics such as won-lost percentages, the number of investigations "in progress," the variety of "comprehensive studies" underway, etc., behind which less impressive realities may often be hidden, will be advanced. But this marks only the beginning of the discussion, not its conclusion. We at N.G.A. believe that such numbers and percentages cannot be realistically calculated into a "success rate" for any enforcement policy. Rather, the real test of any regulatory policy must be seen in the marketplace itself. If its operations are orderly, if there is a manifest absence of predation and hostility, if a free and fair climate of competition is obvious, then government regulatory efforts must be judged successful, no matter what the numbers. If such is not the case, if predatory, anticompetitive practices are on the increase, then it is futile to discuss the statistical niceties of cases brought or investigations begun. We know that the legal system is failing. The operations of the market tell us so.

N.G.A. believes, regrettably, that this is the message of the present system. But how can one square the dismal realities of the market with the more optimistic enforcement picture of vigorous activity painted by the F.T.C.?

The explanation can be found in two recent policy directions undertaken by the Commission. The first rests in a seemingly conscious decision to significantly restrict the scope, the coverage, the reach of available antitrust statutory prohibitions. Practices and activities which previous Commissions might have viewed as worthy of serious Bureau investigations and even prosecution are now deemed acceptable. (One result is the inevitable improvement in the Commission's "won-lost" percentage. By focusing more exclusively upon norrower, easier cases, ultimate judicial success is more likely to be assured). Of course, as noted earlier, the relevant statutes do vest within the Commission significant regulatory discretion. It is the more lenient exercise of that discretion through far broader and tolerant legal interpretations which has produced the present "enforcement" controversy. How to characterize this policy redirection? N.G.A. would agree with Commissioner Patricia P. Bailey. Asked to comment upon current proposals for a substantial broadening of the definitions of prohibited practices, she wrote that while the reform was not "perfect," "I do believe it is more of a step in the right direction than the Commission majority's "anything goes" approach, announced in ITT Continental Baking Co. Inc., D. 9000 (July 25, 1984)." (See letter of F.T.C. Commissioner Patricia P. Bailey to Representative James J. Florio; January 25, 1985; p.1.)

"Anything goes" is not a standard we believe any responsible government can long tolerate.

A second major reason for concern is the increasing reliance of the Commission upon the position that formulation of specific rules which would prohibit predatory pricing practices is theoretically impossible without a concomitant reduction in genuine price competition. The "costs" of so restricting valuable competition are alleged to greatly outweigh any marginal benefits to be obtainted in prosecuting the "all too rare" genuine predator. Such a theoretical formulation has too rapidly assumed the role of a practical guideline for Commission investigative and enforcement actions. Once again, Commission officials may be their own best spokespersons. Thus in a recent Supermarket News (April 8th) article, Mr. Ronald B. Rowe,

Assistant Director of the Bureau for Energy and Food, denied any changes of enforcement laxity.

"He asserted, however, that in order to move forward with a predatory pricing complaint the bureau has to have a case that meets the guidelines established by Federal courts. He said those guidelines had been spelled out by the 2nd U.S. Circuit Court of Appeals in 1981, when it stated: Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubteldly chill the very behavior the antitrust laws seek to promote."

Now, of course, this dictum, drawn from *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F. 2d 76, 88, in *absolutely no way* provides a "guideline" for which cases the Bureau should or should not investigate or should or should not prosecute. It does, however, suggest that if such a statement does become the guideline—which it may very well already have done—governing Bureau and F.T.C. enforcement policies then no effective predatory pricing cases can be expected due to the fear of "chilling" valid price competition. Such a "guideline" is a virtual per se license to practice predation.

Rather obviously the dynamic combination of these two factors produced an "enforcement" philosophy and practice which, while statistically impressive, is practically destructive.

Perhaps the most serious manifestation of this limited vision on the part of present regulators has been their unwillingness to deal effectively with the growing problem of cross-operational subsidization. While there are numerous variations upon this theme, its essence occurs when the large profits of one individual unit or division of a large firm, usually operating under conditions of little or not effective competition, are used to subsidize the aggressive, below cost and profit pricing policies of another unit or division. Such a phenomenon can be witnessed in some of America's cities where even a cursory tour may reveal a single firm selling the exact same good or product at widely varying prices throughout the geographical market. Of course such "sales" on a temporary or short-term basis may reflect the honest, healthy operations of a truly competitive market. But far too often they serve to shield aggressive, long-term purposes. Nor should one feel safe if prices appear to be uniformly low throughout your city or town. Consumers outside the market area may be paying for your temporary good fortune by artifically high prices in their own homes. Dramatic evidence of such a situation was provided recently in the city of Houston. Discussing a current "battle on food prices," Gregory Seay, the Business Writer for the Houston Post, cited Mr. Dean Gantt, a vice president in charge of Safeway's Houston Division, as explaining how his firm had been able to aggressively enter the competition. Seay writes:

"In addition, the 70 stores Safeway operates in Houston effectively can be supported by revenues from the 60 or so stores located in healthier, less-competitive markets outside the city, Gantt says. Kroger enjoys a similar situation."

Similarly vivid examples from the Louisiana area were provided by Representative W.J. (Billy) Tauzin at the April 16th Commerce, Transportation and Tourism Subcommittee Hearing.

Lest anyone be tempted to view such subsidization as normal market operations, particular stress should be laid upon the inevitably "temporary" nature of any price savings enjoyed by consumers in such a competitive environment. Once a predator's rivals have been eliminated or sufficiently "disciplined" it will feel free to raise prices to substantially higher levels—levels such as those already existing in less competitive markets, and from which its aggression, as Mr. Gantt admits, had previously been financed. But even were this not to be the case, such cross-subsidization violates a fundamental sense of American fairness. Absent compelling economic and social justifications, there is no reason why a regulatory system should permit some consumers, arbitrarily located through choice or chance, to be forced to pay the excess prices necessary to finance the lower prices charged their fellow citizens, fortunate enough to live in a designated "target" of a particular predator.

Now, of course, the Federal Trade Commission and its staff of economists would assure you that such a situation is "theoretically impossible" in the "long-run." That if prices are artifically high, new competitors will be attracted, capacity will expand, prices will again be driven down, and that most sacred of all conditions "equilibrium' will be restored. Well, to be frank, it just ain't so! The supermarket industry today cannot be classified as an ease of entry type business. Especially when it is recalled that the size of the new entrants must be of sufficient magnitude to establish its "relevance" in correcting the already established predator's overpricing. Thus, while "low" entry barriers may allow a new store operator to open a 20,000 square foot store, that new entry will do little or nothing to deconcentrate

the market or to force prices back to competitive levels. One fears that the Commission has confused the ability of single stores to exist with low entry barriers for the type of entry that can have market-wide benefits for the consumers.

Again, the difficulty here is the excessive reliance by the Commission upon the theorems of the textbooks rather than the practical lessons of real world operations. Most potential competitors are confronted with the absolutely vital factor of predicted *risk* involved in entering or expanding in any market. The inability to predict the ability and willingness of any predator to sustain his below cost-profit operations because of his "deep pockets" lined with revenues from other operations and divisions, some located hundreds of miles away, may act as an insuperable—although totally reasonable—barrier to any possible competitor, no matter what the textbooks and charts may argue.

N.G.A. is especially concerned that no one form the view that pricing practices such as these have always been "standard operating procedure" within the retail grocery industry. Most assuredly this is not the case. For decades this has been a fundamentally honest industry, which when aided by a supportive governmental regulatory climate was more than willing to vigorously condemn such price manipulations. But with the recent alteration in direction of the policies and message of the Federal Trade Commission more and more competitors have quite naturally been tempted to press the law to its very limits and beyond. The "anything goes" signals sent out by the Commission have been a powerful impetus to these practices.

Now, N.G.A. and its members have stood clearly opposed to such subsidization practices. Despite our past inability to obtain Commission rulings on these matters, we now call upon the F.T.C. to offer formal guidelines on these practices. Does the Commission believe such subsidization practices, and the predatory pricing which they engender, to be legally permissible or not? If it views all or some such practices as objectionable, then let the Commission spell out such regulations. If on the other hand, as would seem to be the case as judged by its actions, the F.T.C. considers subsidizations of the type and kind herein described as no more than "normal market operations" then the Congress of the United States and the American public deserve that opinion in unmistakable terms. At least then we can intelligently consider the most appropriate remedies to this unfortunate policy.

The success of any "enforcement" policy cannot be measured in the cases investigated, prosecuted, or "won" in court. The real measure of the law's success must be found in the very number of such cases which do not need to be brought. The number of crimes which are deterred from criminal commission by existing law enforcement policies is the only accurate standard of success. N.G.A. believes that by this measure federal regulatory and enforcement policies are failing. The signals, the message of toleration and license is being increasingly read and understood.

Unless a new framework for statutory evaluation is imposed, and imposed soon, all American consumers will pay a much higher price, the destruction of this nation's active and vital small business community.

Even in those instances in which agreement does exist upon the proper purpose and coverage of statutes as written, cooperation in the actual practices and procedures of law enforcement itself remains essential. No doubt in an ideal world the righteous, concerned citizens or small individual business could bring the "bad guys" to justice without any outside aid. But this Committee need not be reminded that the real world is a very, very different matter. Heavily staffed, equipped, and financed police agencies of all types and size are necessary to protect our citizens from a formidable array of criminal offenders. Certainly in the corporate world of antitrust rules and regulations no small business alone possesses sufficient resources to protect itself. In most instances only the appropriate governmental agencies possess the necessary investigative and prosecutorial tools to effectively combat unfair activities.

Yet for all of this, the road to successful deterrence and exposure of predation remains essentially a two way street. Often it is only the individual complainant who can provide the highly particularized details and expertise to initiate proper investigative directions.

To be more specific, the National Grocers Association and many of its members have all too frequently brought complaints to the F.T.C.'s Bureau of Competition. In cities such as San Antonio and indianapolis small grocers, confronted with serious anticompetitive attacks, have urgently requested initial F.T.C. investigations as the only available vehicles to provide adequate supporting materials for appropriate legal remedies. In each case the official responses have been similar: rejection, silence, delay, allegation of "inadequacy." In an attempt to cooperate with both the small business community and with the Commission's agencies, the N.G.A. has formally requested that the Bureau of Competition provide us with some rules or

guidelines describing the nature, quality and quantity of evidential submissions which potential complainants must meet in order to obtain initial Bureau investigative activity

Obviously if we could be offered such general guidelines small business complainants across the country could direct their efforts to obtaining the exact types and kinds of evidence which the Bureau theoretically requires. Moreover, such guidelines would greatly increase the ability of individual parties as well as governmental overseers, such as the members of this Committee, to accurately assess the Bureau's decision to initiate or not initiate individual investigations. Unfortunately, if anything the response to what would seem to be a most reasonable request has been even more frustrating. Initially, in an early January meeting Ms. Joan Greenbaum, Deputy Assistant for Food referred us to a variety of sources as providing relevant guidelines. These included a speech of F.T.C. Chairman Miller and a variety of major federal judicial opinions. Our Association eagerly examined all of these responses and was bitterly disappointed in their results. The N.G.A. staff subsequently produced an itemized evaluation of each of the Bureau's suggestions. As to Chairman Miller's comments permit me to quote from the Staff Report:

"The Chairman suggested the easy availability of the type of practical guidance we are requesting. He wrote: 'the most recent example of our efforts to explain the "Rules of the Game", is the Publication of a booklet entitled "Antitrust for Small Business," which the F.T.C. has written in conjunction with the Department of Justice and the Small Business Administration. These guidelines are written in laymen's language, so that everyone—even a poor country economist like yours truly—can understand. We hope such understanding will result in more compliance with the Nations's antitrust laws.' While skeptical of the possible contents of such a publication we attempted to obtain a copy thereof, only to be informed that it had yet to be published and 'no date' had been set for its future production. In summary, while Chairman Miller's statements can be utilized to obtain a very general understanding of the legal requirements for final conviction, that in no way addresses the evidential requirements for initial investigation."

We regret to report that "no change" has yet taken place. A recent telephone call to the F.T.C. offices produced the same response: poor country economists will just have to keep waiting.

As to the judicial opinions cited by Ms. Greenbaum, each one contained a number of flaws—see Conclusions of N.G.A. Staff Analysis which are attached. Most importantly, they focused exclusively upon the final evidential burdens required to obtain a conviction in court, not the initial evidential burdens which could reasonably be expected of complainants merely seeking a first-phase F.T.C.-Bureau investigation to obtain those very same types and kinds of evidence. An almost precise repetition of this process could be found at the recent Subcommittee Reauthorization Hearings. There, despite sharp questioning from Representatives Tauke and Tauzin, Chairman Miller essentially refused to define any such standards. Once again, he generously offered to provide his interrogators with various "court decisions" within the literature. However, as previously noted, such "decisions" spell out the rules for conviction, not for the requirements to obtain an initial, formal investigating proceeding.

The Staff Anaylsis referred to previously was promptly submitted to the Bureau, with an accompanying second request for such evidential guidelines. Committee members might imagine our surprise to learn, after initial assurances that we could locate F.T.C. standards in the source previously cited, that Ms. Greenbaum's next communication informed us:

"Your letter requests an official statement concerning the evidentiary standard for initiating investigations. We do not have any specific evidentiary standards that are applicable to cases generally, nor is there any specific evidentiary threshold that a complainant must meet in supplying information to us. . . .

"Your letter of January 24 complains that we have not provided your specific guidance concerning the information you must provide to convince us to open an investigation of the situation in Indianapolis. You are correct that the decisions to which we referred you provide only general guidance on what is necessary to prove a predatory pricing case at trial, and that the court decisions say nothing about what information is necessary to open an initial phase investigation".

Of course, such a situation must place the average third party in an almost impossible and largely wasteful "guessing game", as he approaches the Bureau hat in hand with little more than hope that his submissions will be fortunate enough to obtain their approval. More starkly, the following formula would seem a fair description of the status quo: Thus, prospective complainant knows (A) that he does not have the means at his own disposal to conduct an investigation, (B) that only the government can do so, (C) that the government will do so if his initial submis-

sions are sufficient, (D) that the government is unable or unwilling to offer him any meaningful guidance in determing such sufficiency, but (E) he should know that the "more" evidence he can offer, the better off he may be.

It should be stressed that N.G.A. is not seeking some highly specific, exceptionally detailed evidential formula. Very clearly each individual complaint and case contains its own specific nuances and factual circumstances. However, merely because every case is different in some ways must not be obscure certain underlying general common elements as well. One obvious way in which the Comission might undertake the process of standard formulation would be a public review of the record of past cases in which initial investigations had been granted. A careful examination of the evidential submissions in those cases would undoubtedly reveal a number of useful similarities which would be most valuable. Such an historical evaluation could obviously be undertaken without violation of any existing confidentiality or informational restrictions.

In any event, we at N.G.A. strongly urge the F.T.C. to correct this situation and to devote immediate attention to the formulation of such standards. If voluntary action is not forthcoming we would suggest Congressional insistence upon such steps would undoubtedly be productive. Only when such evidential rules have been formulated and made available will the individual complainant and the objective reviewer be a position of judicious judgment.

This has been only a review of some of the most essential issues which now potentially divide the F.T.C. and the small business community. We hope these comments will serve to increase your own interest in activity promoting a cooperative partnership between small business and government. Too often in recent years the relationship between the Commission and this segment of American corporate life has bordered upon the adversial. With your help and effort we can all work together to create the dynamic, free, and fair economy which was the original object of the nation's antitrust law and the purpose for the creation of the Federal Trade Commission.

In closing this statement, the national Grocers Association expresses the hope that the Senate Committee on Commerce, Science, and Transportation will not permit its reauthorization hearing to be utilized in any way as an endorsement of actual F.T.C. policies or practices. In restricting testimony at the formal hearing to narrow range of more technical issues, the Committee has shown a clear desire to limit the scope of its inquiry. We would hope that in any subsequent publication or report it would be made equally clear that no F.T.C. policy endorsement was intended or obtained through the reauthorization hearing process.

N.G.A. believes that increasing difficulties with the antitrust enforcement policies of the Commission fully warrant a rigorous formal Congressional examination. We would urge upon this Committee, and/or other appropriate Congressional bodies, prompt planning and implementation of a thorough, comprehensive oversight examination of the policies and practices of the Commission.

CONFERENCE OF CHIEF JUSTICES
April 24, 1985.

Hon. BOB KASTEN,
Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, Washington, DC.

DEAR MR. CHAIRMAN: This is to express the views of the Conference of Chief Justices on reauthorization of the Federal Trade Commission.

We address only that portion of the record relating to the FTC in its relations with state-licensed professionals, specifically the legal profession, an adjunct of the judiciary which functions under carefully crafted rules promulgated by state supreme courts.

As the attached resolution indicates, our official policy urges Congress to "deny authority to the FTC or any other federal agency to preempt the traditional powers of state supreme courts to regulate all lawyers or groups of lawyers in their respective states, especially in the areas of codes of ethics, disciplinary rules, and commercial and business practices." But it should be noted that this position was not adopted until July 27, 1983 when the so-called American Medical Association-Federal Trade Commission compromise was pending in both houses of Congress. Prior to that time the Conference of Chief Justices, like the American Bar Associaton, had not felt it necessary to seek legislation barring or restricting FTC regulation of the legal profession. However, we were concerned, as was the ABA, that the newly developed compromise would codify an FTC authority over the legal profession that

would greatly complicate, and be inconsistent with, the historic role of state supreme courts as regulators of the bar.

It is our understanding that the ABA and the AMA now take the position that it is no longer necessay to adopt specific language on the professions as part of an FTC reauthorization bill. We concur in that view and urge the subcommittee to delete the compromise language in S. 1714, 98th Congress, from the legislation when reintroduced this year.

As our resolution states, conflicts between regulations of the FTC and state supreme courts would create great uncertainty as to the accepted standards for the practice of law and lead to needless friction and litigation. Judicial control of the legal profession, as evidenced throughout our history, is essential to the American system of justice. It is a complex responsibility, based on hundreds of years of experience in the English and American judicial systems, we exercise with the utmost care.

We also are concerned that federal intrusion on this responsibility, historically reserved to the states, will raise constitutional questions not readily resolved. Given the complexity of existing law under the state action doctrine, together with the carefully balanced relationship between courts and the legal profession, we believe the issues addressed through the AMA-FTC compromise can best be left to resolution by the courts on a case by case basis.

We appreciate this opportunity to comment and trust our remarks will be made part of the hearing record.

Sincerely yours,

W. WARD REYNOLDSON, *President.*

NATIONAL CREDIT UNION ADMINISTRATION,
Washington DC, April 26, 1985.

Hon. ROBERT W. KASTEN, JR. Chairman,
Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am pleased to respond to your request for comments on a proposed amendment to the Federal Trade Commission Act which would exempt Federal credit unions from Federal Trade Commission jurisdiction to the same degree which banks and savings and loan associations have already been exempted. I continue to be very supportive of this amendment which would eliminate the potentially duplicative regulatory scheme which currently exists.

Presently Federal credit unions are subject to both the jurisdiction of the Federal Trade Commission and the National Credit Union Administration with respect to investigatory and enforcement authority. In order to receive the same exemption which has previously been granted to banks and savings and loan associations, Sections 5, 6, and 18 of the Federal Trade Commission Act should be amended to exempt Federal credit unions.

The National Credit Union Administration is prepared to ensure proper compliance in such matters, and we concur that our authority under Section 120 of the Federal Credit Union Act (12 U.S.C. § 1766) and Section 206 of the Federal Credit Union Act (12 U.S.C. § 1786) is sufficient to protect the interests of Federal credit unions members. NCUA will, of course, promulgate substantially similar rules to those promulgated by the Federal Trade Commission under Section 18(F) of the Federal Trade Commission Act unless we determine that such acts or practices are not unfair or deceptive with respect to credit unions.

I thank you for the opportunity to comment on this matter and would encourage your continued efforts in obtaining amendatory language to the Federal Trade Commission Act exempting Federal credit unions from the jurisdiction of the Federal Trade Commission.

Sincerely,

E. F. CALLAHAN, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, DC, May 3, 1985.

Hon. ROBERT W. KASTEN, Jr., Chairman,
Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of April 26, 1985, requesting an analysis of the Supreme Court's recent decisions in *Southern Motor Carriers* and

Town of Hallie and their impact on Federal Trade Commission authority, particularly in the professions. The Commission and its staff are currently analyzing these two opinions to assess their impact on the Commission's law enforcement work. Their relevance and precedential value will vary depending on the factual and legal setting of each case. I can comment generally on the questions you ask, on the basis of my own quick assessment of these recent cases, but I cannot, of course, discuss these recent decisions' specific bearing on matters now in adjudication before the Commission.

In *Southern Motor Carriers Rate Conference* v. *United States*, 53 U.S.L.W. 4422 (U.S. Mar. 27, 1985), the Supreme Court clarified the antitrust "state action" doctrine, making clear that anticompetitive conduct by private parties, though not compelled by a state, will nonetheless be immune from Sherman Act liability when it is undertaken pursuant to a clearly articulated state policy to displace competition and is actively supervised by the state. In *Town of Hallie* v. *City of Eau Claire*, 53 U.S.L.W. 4418 (U.S. Mar. 27, 1985), the Court ruled, similarly, that a city may establish state action immunity under the Sherman Act when its conduct is not compelled by the state if the conduct is taken pursuant to a clearly articulated state policy to displace competition with a regulatory structure. The Court held, in addition, that active supervision by the state is not a prerequisite to exemption from the antitrust laws when the actor is a municipality rather than a private party. Both cases emphasize the federalism and state sovereignty principles upon which the state action doctrine rests.

The *Southern Motor Carriers* decision is clearly important, in that it definitively holds for the first time that compulsion is not a necessary element of a state action immunity claim for private parties in Sherman Act cases. This holding is not likely to have a major impact on the Commission's work, though, because in the professions the Commission has not brought cases that depend for their success on such a compulsion requirement. The Court's opinion also discusses what evidence, short of compulsion, is sufficient to establish a state policy to displace competition with a regulatory structure that immunizes particular conduct. This portion of the Court's opinion is likely to be most useful in assessing factual situations closely parallel to those addressed by the Court in *Southern Motor Carriers* concerning collective ratemaking. For the Commission's professions work, in which collective ratemaking has not been involved, the Court's opinion does represent the latest word from the Supreme Court on a legal defense occasionally raised in our cases, but it does not appear to require any significant modification of the straight-forward antitrust law enforcement the Commission has been doing. Even regarding ratemaking, the opinion does not necessarily mean an end to antitrust cases. For example, the Commission's decision in *Massachusetts Furniture and Piano Movers Association, Inc.*, 102 FTC 1176 (1983), *appeal pending*, No. 83-1892 (1st Cir., argued June 4, 1984), found, among other points, a lack of active state supervision that is necessary to provide immunity. The *Southern Motor Carriers* decision did not address this active supervision issue. Of course, the full significance of *Southern Motor Carriers* will be clear only as the Commission and the courts interpret and apply its holdings in discrete circumstances.

The *Town of Hallie* decision also should not interfere with sound antitrust enforcement by the Commission. As you may know, the Solicitor General's amicus brief in *Town of Hallie* urged the result reached by the Court, and the Commission has always assumed the law is as the Court stated in its opinion.

I hope this information is helpful to you. Please let me know if I can be of any further assistance.

Sincerely yours,

JAMES C. MILLER III, *Chairman.*

○